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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LYNDON H. LAROUCHE, JR.,
WILLIAM WERTZ, EDWARD SPANNAUS,
MICHAEL BILLINGTON, DENNIS SMALL,
PAUL GREENBERG and JOYCE RUBINSTEIN
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the seven defendants were denied their rights to a fair trial, to due process of law, to the assistance of counsel and to prepare and present defenses, in violation of the Fifth and Sixth Amendments to the Constitution of the United States, where they were forced to trial over vigorous protest 38 days after the return of a 52-page, two conspiracy, 13-count indictment which resulted from an extensive four-and-one-half year nationwide investigation and which alleged 121 overt acts citing 14 unindicted co-conspirators, and where the government listed 53 trial witnesses and turned over a massive quantity of discovery materials during the time between indictment and trial.

2. Whether the peremptory selection of a jury by the court after denying defendants' motions seeking selection of a fair and impartial jury violated the Sixth Amendment to the Constitution of the United States where despite presentation of 65 representative newspaper articles circulated in the Alexandria Division showing prejudicial pretrial publicity of the most intense nature and animus toward defendants, the highly controversial presence of the international headquarters of defendants' principal organizations within the Alexandria Division, the known hostility between defendants and federal agencies and officials and the very high percentage of federal government employees in the jury lists, a jury was chosen by the judge in less than two hours; there was no probing for prejudice; general questions were asked of the array; eight of the jurors were never asked an individual question and never answered any question except by silence; a high percentage of the jury panel and the sitting jurors were directly employed by the federal government, or dependents of government employees; employees of the FBI, the U.S. Department of Justice and the wife of a retired FBI agent were not excused for cause; and where it was not discovered until after the trial that the jury foreman's job assignment

included liaison with a federal agency which defendants had vigorously and publicly attacked.

3. Whether the pretrial entry of an order limiting the presentation of critical evidence by defendants at trial and denying discovery of related evidence in the possession of the government contravened defendants' right to prepare and present defenses, in violation of the Fifth and Sixth Amendments, where defendants received the government's motion *in limine* on November 9, 1989 without prior notice such a motion would be filed; were forced to argue the motion the next day along with many other motions; and where the court granted the government's motion in all significant respects that same day, only 11 days before trial, in an order excluding, primarily on Rule 403 grounds, evidence that would support defendants' stated defense that the U.S. government itself was responsible for their failure to repay loans for which they were indicted while simultaneously denying all of defendants' discovery requests aimed at obtaining evidence to prove this defense.

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CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THIS CASE

UNITED STATES CONSTITUTION

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

18 U.S.C. Sec. 3161(c)(2)

Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed *pro se*.

Federal Rule of Evidence 403

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

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OPINION IN THE CASE

The opinion of the Court of Appeals is reported at 896 F.2d 815. (A. 1) The rulings and opinions of the District Court are unreported, however selected rulings are reproduced in the Appendix. (A. 58, 240)

JURISDICTIONAL GROUNDS IN THIS COURT

The order and opinion of the Court of Appeals sought to be reviewed were entered on January 22, 1990. (A. 1) An order denying petitioners' timely petition for rehearing with

suggestion for rehearing *in banc* was entered on February 16, 1990. (A. 37) 28 U.S.C. §1254(1) is the statutory provision that confers jurisdiction on this Court to review this case by writ of *certiorari*.

STATEMENT OF THE CASE

The critical facts presented here demonstrate that the procedure followed below was so distorted, biased and unfair as to negate even the appearance of justice or the protection of the Petitioners' fundamental constitutional rights. The defendants were indicted in a forum nationally known for its "rocket docket," were rushed to trial despite their protestations that they could not possibly be prepared in the time allotted, had a jury chosen in perfunctory fashion despite extensive hostile pretrial publicity with no effort to uncover prejudice, and were denied the right to present their defense to the jury by a pretrial *in limine* order. While each of the three issues raised by the Petitioners are significant in and of themselves, in combination they show that there was never any intention to conduct a fair trial. A full explanation of what occurred below illustrates the magnitude of the injustice[1] and the nature of the threat to the Constitution presented when a controversial political group is brought to trial in a manner that makes a mockery of the right to a fair trial.

I. The Rush to Trial

On Friday, October 14, 1988, a federal grand jury sitting in Alexandria, Virginia returned a 52-page indictment against

[1] This gross miscarriage of justice resulted in prominent international jurists, as *amici*, raising the question below: "If defendants tried in a United States court are denied important rights for a fair trial by an impartial jury, this in turn constitutes a setback for the evolution of human rights in the entire world." *Amicus Brief of Prof. Dr. Richard Klecatsky and Prof. Dr. Wolfgang Waldstein of Austria*, filed May 25, 1989 in the Fourth Circuit.

seven individuals which contained 13 counts, alleged 121 separate overt acts and named 14 unindicted co-conspirators in two separate conspiracies. The first 12 counts charged a mail fraud conspiracy and 11 counts of mail fraud in connection with unpaid loans to three corporations, and the final count charged a conspiracy to impede the IRS.

The principal defendant, Lyndon H. LaRouche, Jr., was charged in all 13 counts and was the sole defendant charged in count 13. He is one of the most controversial public figures of the previous twenty years, a subject of continuous notoriety and frequent publicity who leads a political movement that has promoted thousands of candidates for public office across the nation. At the time of the indictment, LaRouche was a candidate for President of the United States, and was on the ballot in twenty states in the election set for November 1988. LaRouche's presence in Leesburg, Virginia, which is within the Alexandria Division of the district court, was a further source of intense local concern, opposition and prejudicial publicity.

The defendants were the target of a nationwide federal investigation and associated grand jury inquiries, one of which led to this indictment. The investigation was coordinated by the U.S. Department of Justice in Washington, D.C. from at least October 1984. It resulted in earlier indictments in Boston, Massachusetts of 19 defendants, including three of the defendants here, with trial in that case beginning on December 17, 1987, after 12 days of jury selection. That trial ended in mistrial on May 4, 1988, with the *Boston Herald* reporting that jurors interviewed said they had unanimously agreed all defendants were "innocent of all charges." The district court in Boston found "systemic and institutional prosecutorial misconduct" surrounding the case, but denied defendants' motions to dismiss, and a new trial was scheduled for January 3, 1989. It was in the wake of these events that a grand jury,

concluding a two-year investigation, returned the present indictment.

Three days after the indictment, on Monday, October 17, before two defendants had secured counsel, the district court arraigned all defendants and set a schedule for motions and a trial date which was strictly enforced. Defendants were given until November 7 to prepare and file motions, with argument set for November 10. Trial began November 21, despite vigorously asserted motions for additional time for preparation as well as an extraordinary application to the Fourth Circuit to mandate additional time. The trial was a mere 35 calendar days after arraignment, with only 31 days having passed between the day the last defendant secured counsel and the date of trial, one day more than the 30-day period within which no trial may commence without written consent of the defendant under the Speedy Trial Act, 18 U.S.C. §3161(c)(2).

The government conducted intensive multi-agency and multi-jurisdictional investigations with significant attendant publicity for four-and-a-half years before this indictment. The Alexandria investigation included two years of grand jury presentations and hundreds of FBI, Secret Service and IRS interviews with contributors, lenders and others across the nation. As part of the investigation, approximately 1.5 million documents, including current loan records, were seized with great fanfare in a 400-agent search executed on October 6, 1986, in Leesburg, Virginia.

Despite what the courts below stated, the Boston trial had not prepared counsel or defendants to defend these charges. Three defendants in Boston were also indicted in Alexandria, and two of the three, including Mr. LaRouche, had been charged only with conspiracy to obstruct justice, a charge that was not related in any way to the Alexandria indictment. The third common defendant, Michael Billington,

was severed from the Boston case before trial. Three lawyers in the present case represented defendants in Boston, but none of these three represented a defendant charged with fraud in Boston, and only one represented the same defendant in both cases.

Furthermore, the charges and evidence in Boston were significantly different from this case. The primary charges in Boston were credit card fraud and obstruction of justice, as opposed to loan fraud in Alexandria. Of 33 witnesses in Boston, only four testified here, and their testimony dealt with different charges and facts. Of the 10 lender-witnesses out of 53 witnesses listed by the government in Alexandria, three were listed in Boston as possible government witnesses, but none had been called there. Of the extensive discovery material and proposed exhibits turned over in Alexandria, only one exhibit had been introduced in Boston. In fact, in its opposition to defendants' motion to transfer, the government argued below that the Boston case was "quite distinct as to defendants, charges and nature of the schemes . . . [there will be] no duplication of efforts." In denying transfer, the court found the cases were different. No litigation or other activity prior to this indictment prepared counsel or defendants for this trial.

Most defendants were involved in the final weeks of a presidential campaign. They had, suddenly, in addition to campaigning to direct their attention to obtaining counsel and commencing preparation for an imminent major criminal prosecution.

When the indictment in Alexandria was received, three lay persons assisting the defense immediately began to make a comparison of the allegations in the indictment with the record in Boston to find common elements. The Alexandria indictment represented forum shopping, defendants knew the reputation of the Alexandria court as a "rocket docket," and

believed Boston the proper forum. Over a three-day period, they rushed to prepare a 35-page motion to transfer the case to Boston with a 98-page analysis attached. This was reviewed by counsel for several defendants and filed on October 17 before all defendants had counsel. If granted, this motion would have obviated the November 21 trial date. It was denied on October 21.

The defense hurriedly prepared and filed 28 motions in the 21 days afforded by the court's schedule, filing four in advance of the deadline. A misjoinder motion filed November 2 with a lengthy supporting memo was denied November 4. Of 23 defense motions set for hearing on November 10, argument was allowed on only eight. No argument was allowed on a 62-page motion for exculpatory evidence itemizing 182 *Brady* requests supported by a 41-page memorandum of law.

Despite the intense pretrial publicity surrounding these defendants, demonstrated in part by a motion supported by 65 representative newspapers articles, no argument was allowed on any of the jury selection motions. Of the eight motions for which argument was allowed, six were on suppression issues, some of which were similar to motions the Boston court had held lengthy evidentiary hearings on. A written order denying all 23 defense motions was signed November 10.

In addition to motion work, preparation for trial required defendants to develop and seek agreement on defense strategies, plan procedures for preparation, agree—where possible—on work assignments, and prepare defenses to the allegations in the 52-page, 121 overt act indictment. The defense had to consider potential testimony by 53 witnesses and 14 unindicted co-conspirators listed by the government and determine who to try to interview among government witnesses. Investigation, interviews and analysis of potential de-

fense witnesses, including defendants themselves was required. They also had to review the nine file drawers of Rule 16 documents, 107 audio and six video tapes with scores of hours of listening time, 1,500 pages of *Jencks* material and 693 trial exhibits that were provided to the defense by the government shortly before trial, consider their significance, and find rebuttal evidence. At the same time, counsel had to prepare for jury selection, plan opening statements, and establish means of coordinating defendants and lawyers in order to effectively allocate tasks during trial.

Defendants first sought transfer of the case to Boston, which would have avoided the premature trial. Four days after arraignment, the likely need for more time to prepare was raised to the Court by counsel for Mr. LaRouche. On November 4, three days before all motions were due, the defense vigorously requested a continuance, specifying tasks essential for an adequate defense. (A. 47) Neither the court nor the government ever expressed any reason, need, justification or public interest to be served by such a rush to trial. While the Court of Appeals referred to an alleged conflict with the Boston retrial date, all parties knew, and the district court was made aware, that that trial would not go forward on that date. Early efforts to secure a continuance having failed, a writ of *mandamus* was sought from the Court of Appeals. It was denied on November 16. A renewed motion for continuance, with supporting affidavits, was also denied by the district court. (A. 60-105)

In the affidavits, each defense attorney expressed his inability to effectively represent his client without additional time to prepare. Odin Anderson, counsel for Mr. LaRouche, who also represented him in the Boston case, stated that he "was quite overwhelmed," "surprised totally by the specifics" of the indictment, that as of November 10, he had spent his "entire time virtually in preparation of motions" and "[it is] impossible to adequately prepare for trial." Attorney Edwin

Williams said he was "unable to provide effective assistance." Attorney William Moffitt said there was "no way [he could provide] effective assistance . . . [that] conviction is inevitable . . . as a result of time pressure." Attorney Kenly Webster, who was not retained until October 21, four days after arraignment, said he had been unable to interview witnesses, or even his client adequately. Attorney Brian Gettings, who served for six years as U.S. Attorney in the Eastern District of Virginia, said he was "stunned by this [trial] date," "no defense counsel could be prepared to go to trial."

In response the district court replied: "I really don't want to hear anymore . . . It's a lament, and the wailing and moaning . . . has gone on as long as I am going to hear it. You are big men . . . I will accept that this is going to be a trial under adversity for you, but I am not going to hear anymore wailing and moaning . . . about why I can't be ready for trial." (A. 107-108) When the case was called on November 21, all defense counsel announced "not ready." The district court ignored this and commenced the trial.

Injury arising from the inability to adequately prepare a defense and of counsel to effectively assist defendants is clear throughout the trial record. Specific deficiencies and errors of defense counsel were detailed for the Court of Appeals below. *See*, Petitioners' Fourth Circuit Appeal Brief, p. 15-17. Due to time constraints, the defense was unable to effectively cross examine prosecution witnesses, to find, interview and present witnesses for the defense, to locate, analyze and present documentary evidence, to thoroughly prepare their expert witness, to prepare defendants to testify, to prepare adequate opening statements, to avoid mistakes from ignorance and to make closing arguments on a well-presented record.

A costly error in an opening statement was made by very experienced counsel through ignorance. (*Id.* at p. 16) In

addition, the defense discovered after the trial that a lead government witness who gave emotional and damaging testimony that she was not repaid as promised by a defendant, had herself extended the time for repayment beyond the trial date. Government counsel apparently knew this. The jury never learned of it.

II. The Failure to Select a Fair and Impartial Jury.

The district court was repeatedly informed before jury selection that the case involved extremely controversial defendants. Two weeks before trial, the district court was made aware of intensive, protracted, highly prejudicial pretrial publicity which saturated the Alexandria Division for years preceding the jury selection. Defendants presented summaries of 65 representative articles appearing in the *Washington Post*, *Washington Times*, *New York Times*, *Richmond Times-Dispatch*, *Fairfax Journal* and other newspapers circulated in the Alexandria Division during the four years preceding the trial.

Highlighted in the stories were statements about the defendants, including: "anti-Semitic leader"; "political cults"; "armed and dangerous"; "small-time Hitler"; "death threat"; "violent prone"; "Suspect in Palme death"; "raises millions, assets $5,000"; "lavish lifestyle"; "extensive nationwide pattern of fraud"; "followers indicted"; "LaRouche Shredding—convincing evidence of destruction of documents"; "many investigations of Lyndon LaRouche"; "Dialing for Dollars . . . phone fraud"; "Millions funnelled to LaRouche"; "Inside Weird World of Lyndon LaRouche"; "burning subpoenaed papers"; "bilking elderly"; "Trail of Suffering Laid to Lyndon LaRouche"; "rivers of cash"; "grievous human suffering"; "cold, callous, cynical schemes"; "hate Merchants." Similar

reporting occurred regularly on local radio, T.V. and in national and Washington-area magazines.

Many of the stories described alleged conduct occurring in the Alexandria Division. Some were devoted entirely to reporting extreme tensions and hostility between defendants and the Loudoun County community from which the jury was, in part, to be drawn. Illustrative of the types of statements included in those articles are: "paramilitary indoctrination center" in Loudoun, Virginia; "LaRouche Arouses Fear in Virginia"; residents in Loudoun say they're "afraid of these people"; Loudoun residents "afraid to speak mind at public meeting"; "hundreds in Loudoun assisted investigation" of defendant organizations; "Big Black Cloud May Leave" [referring to defendant's moving from Loudoun County]; "Leesburg wants to get rid of him"; "Loudoun County Arrests" of 16 associates of LaRouche; "LaRouche indicted . . . 19 years of investigation"; "Neo-Nazi"; "jubilation in Leesburg . . . slapping each other on the back . . . going crazy" [over the Boston indictment of LaRouche]; "Loudoun Acts to Oust LaRouche."

In the face of such pervasive and highly prejudicial pretrial publicity, the trial court, after excusing 28 of 75 in the array for hardship without requiring any explanation, began jury selection by describing the indictment in barely one hundred words. Without identifying defendants in any way except by name, it told prospective jurors "the defendants in this case have been in the publicity." It then asked the array "whether anything you may have read or heard or seen has caused you to form any adverse opinion of these defendants or about their guilt or innocence in this case." Without any further background, seven of 47 prospective jurors, in the presence of all, said they had an adverse opinion and were excused. (A. 116-118) The question was never asked again. A motion to discharge the array for pollution based on this was denied, and the remaining jurors were not even asked

whether they were affected by the seven persons who admitted their prejudice in open court.

In its second question, the court asked the remaining 40 jurors whether any had read or heard or seen anything about "this case." (A. 118) The 22 who remained silent, including eight of the jurors who served, were never asked another question about pretrial publicity. The slightest effort by the court to probe would clearly have shown they knew about the case or the defendants, particularly Mr. LaRouche. However, the manner of the court's questioning caused them not to answer. Of the nine questions by the court to the panel, six elicited no response, including whether any prospective jurors had ever been "victim of a crime or participated in a criminal case or in any other capacity?" (A. 146) For none to have been a crime victim or have some contact with criminal proceedings was a near statistical impossibility. Yet the district court made no further inquiry.

On the day before jury selection, November 20, 1988, the *Washington Post* carried a lengthy story, with a picture of Lyndon LaRouche, reporting an alleged "34 Million Dollar Fraud." It described the frustrations of the Boston trial, blaming alleged tactics of defendants, and concluded that the court was "forced to declare a mistrial." Five prospective jurors who acknowledged reading the story were not questioned about what they remembered from the story, and were not excused.

The defendants tried diligently to secure a fair jury selection process. They notified the court of the intense prejudice created by hostile pretrial publicity, of the high level of activity and visibility of defendants in the Alexandria Division, of local hostility toward their activities in Leesburg, of intensive recruiting and literature sales at shopping malls, National and Dulles airports, house-by-house solicitations and phone calls in the Alexandria Division. They moved for individual *voir*

dire by counsel. They moved the court to use a preliminary written questionnaire for prospective jurors. They filed a motion for permission to submit specific questions to be asked of prospective jurors citing a list with description of 65 news articles exemplifying the inflammatory prejudicial coverage of defendants. They requested additional peremptory challenges in view of the nature of the case and number of defendants. But on November 10, eleven days before trial, the court peremptorily denied all jury selection motions except the request to submit specific questions. Defendants thereafter submitted 50 detailed proposed *voir dire* questions. The court rejected them, conducted the entire *voir dire* itself without permitting counsel to ask any question of the jurors, and proceeded to impanel a jury with no probing for prejudice.

The entire *voir dire*, reported in 38 pages, can be read in less than thirty minutes. (A. 116-146) Eight jurors who sat on the case never answered a question except by their silence during the short *voir dire*. The complete inquiry within their hearing is covered by 13 pages of transcript. (A. 116-118, 139-146, 150-151) During this time, they saw and heard seven prospective jurors say in open court that they had an adverse opinion of defendants caused by what they had heard or read about defendants. The jurors then saw eight more excused after saying they had read, heard or seen something about the case, including a Secret Service agent who prepared demonstrative evidence for this case.

The 18 persons who acknowledged reading, hearing or seeing something about the case were individually questioned briefly as to whether what they heard or read created prejudice. This required some 25 pages of transcript. Most described media coverage, or personal confrontations with LaRouche supporters, that was unrelated to the case on trial, demonstrating they had not understood the court's question,

and nine were excused for holding an adverse opinion that they did not reveal in response to the first question.

The 18 prospective jurors' who were cursorily examined showed a range of knowledge about, and some contact with, defendants. One remembered a personal confrontation with political organizers who were promoting LaRouche's candidacy at a public forum. No juror was asked about campaigning, fundraising, or literature sales activity associated with the LaRouche political movement. None were even asked if they knew any defendant or any associate of the defendants. Several mentioned reading about controversy involving the defendants in Loudoun County. Other jurors were never questioned about this. One volunteered a serious aversion to defendants' brand of politics. Other jurors were never questioned about their opinion of defendants' political views or tactics. One volunteered that he found it hard to accept the reported statement by LaRouche that he had no income. Other jurors were not questioned on this frequently reported subject.

One juror said her husband, a retired FBI agent, mentioned the *Washington Post* story of the day before the trial and observed she might be on the jury. There was no follow-up on their conversation. When told her husband was a retired FBI agent, the court asked, "Would this affect your ability to be an impartial juror in this case in your opinion?" A one word answer, "No," ended the inquiry without concern for her husband's FBI duties and contacts, and she was not excused. One Justice Department employee said he read clippings about LaRouche as they came across his desk as part of his duties. There was no follow-up and he was not excused. Defendants were compelled to use two of their ten peremptory challenges on those two persons who should have been excused for cause.

Eleven of the 31 prospective jurors who remained after the question concerning publicity revealed that they or imme-

diate family members worked or had worked for law enforcement agencies, including the DEA, the Department of Justice, three with the FBI, two with the CIA, Department of Labor, Department of State in security, and two with the IRS. One CIA employee was excused after stating, in the presence of the remaining panel, that he had extensive dealings with the FBI and DEA and could not be impartial. (A. 144-145) Other government employees among prospective jurors, as revealed by juror information cards, worked for the Department of Defense, the Defense Intelligence Agency and the Department of Agriculture. Among the twelve jurors who served, three were federal government employees. Another was the wife of a Navy engineer. Two jurors worked for defense contractors. *See*, Appeal Brief, *supra* at p. 32.

The Department of Agriculture employee, Buster Horton, became the jury foreman. He worked in the emergency personnel unit with direct liaison responsibilities to the Federal Emergency Management Agency ("FEMA"). FEMA policies had been strongly denounced by Petitioner LaRouche as part of a "secret government" apparatus which was undermining our Constitution, yet defendants never knew of Horton's FEMA involvement until after the trial, since jurors were not questioned about the nature of their employment. *See*, Appeal Brief, *supra* at p. 32-33. The court later explained his view of *voir dire* to defense counsel by stating: "[Y]ou know and I know that all this business about uncovering bias is just a smokescreen . . . for really selling your case to the jury." *See*, Appeal Brief, *supra* at p. 35.

Most jurors were simply not responding to the few and general questions asked by the court. Without any response from which an evaluation of potential prejudice could be made, the court qualified eight persons who remained silent throughout the *voir dire*. Others qualified if they stated, in response to a conclusory question, they could be fair.

Seven defendants were forced to divide the statutory minimum ten peremptory challenges with no rational basis for deciding how they should be exercised, except to strike FBI and Department of Justice employees, who were unexamined, because of their employment, and to react to subjective impressions about others. The court afforded the defense ten minutes to evaluate the remaining pool before forcing them to exercise their limited strikes. By guessing, defendants used all of their peremptory challenges except one, which they were forced to reserve to avoid the seating of an FBI employee who would have been reached if the government exercised one additional peremptory challenge. Finally, the court denied defendants' post-trial motion to interview jurors, thus foreclosing defendants' ability to ever uncover animus, potential prejudice or motive to convict that was not revealed during the perfunctory *voir dire*.

III. The Order Prohibiting Presentation of a Defense

Eighteen months prior to the indictment, on April 20, 1987, the United States, acting through the same U.S. Attorney's Office that prosecuted this case, was the sole petitioner in a U.S. Bankruptcy court action seeking to place into involuntary bankruptcy the three companies that were the debtors on the loans that were the basis for the indictment. The government obtained an order, in an extraordinary *ex parte* proceeding, appointing interim trustees who were directed to seize the assets of the three companies, run their businesses, and refrain from paying any debts other than as approved by the court. The interim trustees, aided by U.S. Marshals, padlocked the offices of the companies in a widely-publicized early dawn seizure the next day. As of the time of this trial, the interim trustees continued to control the companies, no payments had been made on corporate loans, and no business activity had been conducted since the day of the seizure. In October 1989, ten months after the jury

verdict in this case, the government's bankruptcy petitions were dismissed on the grounds, *inter alia*, that they had been brought by the United States in "bad faith." *In re Caucus Distributors, Inc., et al.*, 106 B.R. 890, at 926 (1989).

On November 7, 1988, the date that all pretrial motions were due in this case, the government filed, and served by mail, a motion *in limine* seeking to preclude the defense from introducing any evidence of the government's involvement in the involuntary bankruptcy proceedings. (A. 196) In addition, the government sought to exclude any evidence with respect to: (1) prior FBI investigations, infiltrations, and use of informants against defendants and their associates; (2) Petitioners' claims that the government, through the FBI, CIA, and others, had engaged in a 17-year pattern of harassment and persecution of them; and (3) Petitioners' claim that their inability to repay the loans they were charged with having fraudulently obtained was due to the government's "financial warfare."

The government's motion *in limine* was received by defendants on November 9, 1988, the day before argument was to be heard on all motions, without any prior notice such a motion would be filed. A written response to the motion and adequate preparation for oral argument were impossible under the circumstances. On the following day, several counsel for Petitioners argued to the court the relevance of the evidence the government sought to exclude, and contended that the government's motion was inappropriate, since a determination of the evidentiary issues raised by the motion would depend on the specific purpose for which a particular item of evidence was to be introduced. Defendants also requested that the court defer ruling on the bankruptcy aspect of the government's motion due to insufficient time to review and evaluate its ramifications.

The court refused to defer ruling, and issued an order the same day granting the motion in all significant respects.

The court did not rule that evidence of the government's involvement in the bankruptcy proceedings was irrelevant. Instead, it barred the introduction of such evidence based on Fed. R. Evid. 403, holding that admission of the evidence would necessitate inquiry into the government's claims underlying the bankruptcy filing and "would divert the jury from the issues." (A. 241)

The court also prohibited the introduction of evidence of government activities directed against defendants and their associates, only permitting defendants to "show that there were unexpected actions by some outside influence, including the government, which had the effect of frustrating [Petitioners'] expectation that repayment would be made." Even with respect to this limited class of evidence held to be admissible, the court prohibited, again pursuant to Rule 403, "delving into any details." (A. 242) The court simultaneously denied discovery requests and quashed a subpoena to the FBI for documents believed to be exculpatory, thereby denying defendants access to evidence to substantiate their defense. Defendants' 182 requests for exculpatory evidence specifically sought evidence of government interference with the ability to repay loans.

While the court stated "this ruling is not written in stone," it made it clear from the start of the trial that it intended to fully enforce its exclusionary ruling. During the opening statement of Petitioner LaRouche's counsel, an objection was sustained to certain statements arguably touching areas excluded by the *in limine* order. When counsel then stated that "[i]n any event, we'll save that for the evidence," the court retorted: "I don't want to mislead you that that will be included in the evidence either." On numerous occasions, the government's objections to evidence on the basis of the *in limine* order were sustained. *See*, Petitioner's Fourth Circuit Joint Appendix on Appeal at pages 1089, 1101, 1597, 1600-01.

The excluded evidence was critical to defend against the charges. A key government contention was that the defendants borrowed money when they knew that repayment could not be made and, central to the defense of this charge was the defendants' contention that failure of repayment was due to wrongful acts by the United States itself, over which the defendants had no control. Defendants were able to prove extensive repayments before the bankruptcy, produced evidence that the loan situation was being brought under control, and sought to show that the government's improper involuntary bankruptcy action against the borrower companies prevented further repayment of the outstanding loans. The *in limine* order prevented defendants from presenting this defense to the jury.

The devastating effect of the court's *in limine* order was also magnified by the time constraints imposed on the Petitioners by the rush to trial. When notice of the court's ruling was received, Petitioners had ten days to prepare a defense taking into account the restrictions imposed by the court which eviscerated their true defense. In view of the monumental number of tasks that had to be done in the short time remaining before trial, defense counsel could not continue preparing their trial strategy as if the *in limine* ruling had never occurred, either in the hope that the court could be convinced to modify its ruling at trial or in order to fill the record with examples of unsuccessful attempts to introduce prohibited categories of evidence.

IV. Summary of Trial and Appeal

The trial began on November 21, 1988. After presenting 30 witnesses in ten trial days, the government rested on December 7, 1988. Defendants called 23 witnesses in three trial days. No defendant testified. The jury returned guilty verdicts against all defendants on all counts after less than

12 hours of deliberations on December 16, 1988. Shortly thereafter, the indictment in Boston was dismissed on the government's motion.

On appeal, defendants argued *inter alia*, that they were denied their constitutional right to prepare their defense before trial by being forced to trial 35 days after arraignment, that they were denied exculpatory evidence in the government's possession, that they were prohibited from presenting their defense to the jury—that government misconduct interfered with their ability to repay loans—in violation of a constitutional right and that they were denied their right to trial by a fair and impartial jury by a totally inadequate jury selection process.

Appeal was argued before a panel of the United States Court of Appeals for the Fourth Circuit on October 6, 1989. On January 20, 1990, the Court of Appeals, finding "no infirmities in the proceedings in the district court", affirmed the convictions and sentences. (A. 36)

On the issues presented here, the Court of Appeals held that the district court did not abuse its discretion in denying a continuance and appellants showed no specific injury resulting from inadequate time to prepare. It held that appellants waived objection to the adequacy of the *voir dire* and that the trial court did not abuse its discretion by the manner in which *voir dire* was conducted. The Court of Appeals further ruled the trial court did not abuse its discretion in prohibiting evidence by its order *in limine* under Fed. R. Evid. 403.

Petitioners' request for rehearing *in banc* was denied on February 16, 1990.

REASONS FOR GRANTING THE WRIT

Every appearance of the record suggests there was no intention of providing these internationally controversial defendants a fair trial. The selection of the forum, an enclave of federal employee presence with a nationally proclaimed "rocket docket," when a major retrial was already scheduled in Boston two-and-one-half months hence, could only be construed as forum shopping. Arbitrarily setting a trial date at arraignment only 35 days away and a complete pretrial schedule for discovery and motions after two years of grand jury presentations, when some defendants had not yet retained counsel in a major complex case, meant there would be no time to prepare a defense. Selection of a jury in a fraction of a morning, without an effort to probe for prejudice, from an array laden with federal employees and saturated for years with intensely hostile publicity against defendants which directly involved local residents and attacks by defendants on the government policies, meant no fair and impartial jury could be secured. An order barring defense evidence of the government's actions preventing the repayment of loans through a bad faith seizure of the concerned corporations via involuntary bankruptcy petitions, as well as the harassment of defendants and their political contributors and lenders, while simultaneously denying all discovery of exculpatory evidence from the government without hearing or inquiry, meant no defense would be allowed.

The appearance perfectly matched the fact. Defendants and counsel were unable to prepare for trial. The jury was unprobed, despite having been saturated with inflammatory prejudicial publicity against defendants for years. The jury was fored by a Department of Agriculture employee with sensitive liaison responsibilities for the government's emergency planning agency, FEMA, which defendants had publicly exposed as destructive of constitutional government. Defendants, who had repaid hundreds of thousands of dollars

in political loans before the bankruptcy seizure, were not permitted to present evidence that the United States caused their inability to repay the loans for which they were indicted.

During the mere two months from indictment through motions and trial to conviction, there was not a single prosecutorial or judicial utterance or act seeking to justify this rush to judgment. Neither did the Fourth Circuit ever express concern with any aspect of the procedure followed by the district court. The rush to trial, the perfunctory jury selection process, and the pretrial curtailment of defense does not appear to have alarmed any member of that court. It is thus important that this Court review this case to ensure that what happened below does not send a message to the Fourth Circuit or other circuits, that the fair trial rights of defendants can be eroded in the name of judicial efficiency. The Fourth Circuit has chosen to endorse the "rocket docket" of the Eastern District of Virginia, and this Court should grant a writ of *certiorari* to let it and other circuits know that this approach is not consonant with the Fifth and Six Amendments.

I. Defendants Were Denied Adequate Time To Prepare Their Defense

After four-and-one-half years of nationwide investigation employing hundreds of federal agents, and two years of grand jury presentations in Alexandria, seven defendants were afforded from one to five days more than the 30 days which the Speedy Trial Act guarantees for preparation of a defense in even the simplest case. Here, defendants had to prepare to defend two conspiracies in 13 counts alleging 121 overt acts. As noted above, the government listed 53 witnesses, turned over nine file drawers of Rule 16 documents, 1,500 pages of *Jencks* materials, 693 trial exhibits, 107 audio and six video tapes to defendants in the days before trial, all of which needed to be reviewed. Under the time constraints imposed,

it was simply impossible to adequately perform all of the necessary tasks.

The pleas of counsel for an additional 60 days or less to prepare a defense, their passionate protestations that they could not provide effective assistance, and their dire prediction of inevitable convictions if more time was not afforded, ring from the transcript. Giving no reason, other than a conclusory and misleading reference to counsels' prior involvement, the district court denied their repeated motions for continuance. The Court of Appeals rejected their application for *mandamus*. They were forced to trial over announcements that they were not ready.

As was stated in *United States v. Rojas-Contreras*, 474 U.S. 231, 240-241 (1985) (Blackmun and Brennan, JJ, concurring):

> The constitutional right to effective assistance of counsel is rendered meaningless if a defendant is forced to trial in the absence of adequate time to prepare. . . . The Speedy Trial Act assures a defendant will be brought to trial quickly, but without undermining the Constitution's guarantee of effective assistance of counsel.

In cases of far less complexity across the country, defendants are not forced to trial with such an impossibly short time to prepare. In the simplest case, few federal districts set trials as quickly as five weeks from arraignment. Even when defendants are in pretrial custody and trials are given priority, most defendants wait for months before trial. The appearance of ulterior motive by the government is reinforced here where defendants were engaged in controversial and often confrontational political activity, with one defendant being a candidate for President on the ballot in 20 states with the election only three weeks after the indictment, and where a major retrial

in Boston of two principal defendants was scheduled two-and-one-half months after this indictment was issued.

The trial court admitted as early as October 28 that he was "pushing defendants a little hard on this case on time." He must have known he was actually denying them a reasonable opportunity to prepare. While making the misleading statement that "most" of the defendants and their counsel had been involved in this case long before the indictment, the trial judge never acknowledged that the seven separate counsel had to be prepared to defend seven individual defendants against *these particular charges* in the short time afforded. There is no surer way to create the appearance of an intention to deny due process to secure a conviction than to arbitrarily rush to trial without any consideration being given to the right to an adequate defense.

This was not merely a case where a myopic insistence upon expeditiousness rendered the right to defend with counsel an empty formality. *See, Ungar v. Sarafite*, 376 U.S. 575, 579 (1964). Under the circumstance, it was obvious defendants would not receive the effective assistance of counsel. *See, United States v. Cronic*, 466 U.S. 648 (1984). Comparison with the Boston trial where jurors unanimously believed the defendants not guilty, under circumstances in which the district court afforded defendants substantial time to prepare, conducted a careful *voir dire* to ensure a fair and impartial jury, and gave careful consideration to the defenses raised by defendants, suggests the overwhelming prejudice to defendants of this unreasoning and arbitrary rush to trial. *See, Morris v. Slappy*, 461 U.S. 1 (1982). Only reference to an earlier tragic miscarriage of justice is adequate to capture what happened here:

> "a defendant charged with a serious crime, must not be stripped of his rights to have sufficient time to advise with counsel and prepare his defense. To do

> that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob." *Powell v. Alabama*, 287 U.S. 45, 59 (1932).

The Fourth Circuit's affirmance of the district court's refusal to grant a continuance was largely grounded on the fact that the defendants remained silent when the trial date was set at arraignment, and did not move for a continuance until November 4—18 days later. Under the Fourth Circuit's ruling, if a defendant fails to move for a continuance at or near the time of arraignment, he risks being found tardy even if a later substantiated motion for continuance is filed. As a result, counsel faced with an apparent insufficiency of time to prepare for trial is forced to immediately file an unsupported motion for continuance, which will likely be viewed by the Court as a mere "knee-jerk" reaction and thus denied. In such a "Catch 22" situation, a defendant's constitutional right to effective assistance of counsel is rendered meaningless. This Court should review this case to ensure that future defendants in the Fourth Circuit are not put in a position where they are forced to file a motion for continuance before they can adequately support it, on pains of being found tardy if they wait until they can adquately document the grounds for their motion.

II. Defendants Were Denied A Fair And Impartial Jury

Rarely have any defendants gone on trial in the United States in the wake of years of such intensive and pervasive prejudicial pretrial publicity as was present here. The media had become habituated to referring to defendants and their associates in the most hateful phrases available: "anti-Semitic leader"; "political cults"; "small time Hitler"; "violent people." Much of the publicity was focused on the area where prospective jurors lived: "LaRouche Arouses Fear in Virginia"; "hundreds in Loudoun assisted investigation."

The district court was presented with extensive samples of four years of hateful media reporting about defendants. It proceeded to perfunctorily *voir dire* the prospective jurors in a way that avoided nearly any disclosure of prejudicial media exposure and generally avoided any juror response whatever. Eight jurors, as part of the array, were asked only nine questions and responded to none. Six of the nine questions elicited no response from any venireman.

Only two questions were addressed to the array which in any way dealt with prejudicial pretrial publicity. First, jurors were asked whether anything they had read, seen or heard about defendants caused them to form an adverse opinion. Second, they were asked whether they had read, seen or heard anything about the case. Seven jurors of 47 were excused after stating, in the hearing of all, that they had formed an adverse opinion. Eighteen answered the second question affirmatively and were individually questioned briefly at the bench. Nine were excused after revealing a variety of prejudicial matters, most having nothing to do with the charges in the case.

While 25 of 47 prospective jurors volunteered knowing something about defendants and 15 were excused, in the face of the enormously prejudicial pretrial publicity the court never asked the remaining jurors, all of whom had remained silent, a single follow-up question, individually or collectively, to discover whether they had heard something about defendants and might be prejudiced by it. There was not only no effort to probe, the court asked questions in a way that caused prospective jurors not to answer. In a matter of minutes a jury was impanelled with no effort to assure impartiality in a case of extreme pretrial publicity and notoriety.

In the Boston trial, Judge Robert Keeton spent 12 court days selecting a jury, utilizing a juror questionnaire and con-

ducting careful *voir dire* with participation by counsel. In *Irvin v. Dowd*, 366 U.S. 717, 727 (1961), there were 2,783 pages of transcript covering jury selection. Here, eight jurors' exposure to questions is covered in 13 pages, and 38 pages report the entire *voir dire*. Since most jurors never answered a single question, it cannot be argued the trial court could judge "demeanor evidence and response to questions" to determine impartiality. *See*, *Rosales-Lopez v. United States*, 451 U.S. 182 (1981). Thus, the discretion which would normally be granted to the district court in its selection of a jury cannot serve to uphold the selection process here.

On the few occasions when a juror's response indicated potential prejudice, the court, without exception, qualified each one who expressed the opinion that he could be fair, without asking a single probing follow-up question. This made the procedure worthless as a means of selecting impartial jurors. *See*, *Rosales-Lopez v. United States*, 451 U.S. 182, 203 n.8 (1981) (Stevens, Brennan, and Marshall, JJ, dissenting).

To date, Courts of Appeals have assumed a judicial obligation to use procedures providing a reasonable assurance that prejudice will be detected if present. They have recognized the inadequacy of general inquiries about impartiality, and the inadequacies inherent in expecting a venireman to assess and confess his own bias. *See*, *e.g.*, *Jordan v. Lippman*, 763 F.2d 1265, 1281 n.19 (11th Cir. 1985); *United States v. Whitt*, 718 F.2d 1494, 1497 n.3 (10th Cir. 1983); *United States v. Corey*, 625 F.2d 704, 707 (5th Cir. 1980); *Beard v. Mitchell*, 604 F.2d 485, 501 (7th Cir. 1979); *United States v. Rucker*, 557 F.2d 1046, 1049 (4th Cir. 1977); *Silverthorne v. United States*, 400 F.2d 627, 637-38 (9th Cir. 1968). Where there is sufficient prejudicial pretrial publicity, they have recognized the necessity of conducting individual *voir dire*. *E.g.*, *Silverthorne*, *supra* at 639.

To hold, as the Fourth Circuit did, that defendants waived any objection they might have to the *voir dire* is to

reward the district court's indifference, at best, to trial by impartial jury. The court refused to conduct individual *voir dire*, to permit counsel familiar with the case to conduct *voir dire*, to probe prospective jurors about prejudicial pretrial publicity, to use a questionnaire to develop background information, or to use the many questions defendants proferred. Counsel did everything they could to secure fair jury selection, only to see the trial court completely ignore their requests. Experienced defense counsel, including three attorneys who observed three weeks of *voir dire* in the Boston trial, knew their clients were being denied a fair jury and saw their every effort to probe for prejudice summarily rejected.

The court, among other abuses in jury selection, refused to excuse an FBI employee, a Department of Justice employee and the wife of a retired FBI agent for cause. Defendants were forced to use peremptory challenges for two and reserve their final challenge to prevent the seating of an FBI employee in the event the government used a challenge to remove the only intervening venireman. Under the exceptional circumstances of this case, it was error not to excuse these three veniremen for cause. Each of the three falls within the "implied bias" doctrine. *See*, *McDonough Power Equipment v. Greenwood*, 464, U.S. 548, 556-67, 558 (1984) (Blackmun, O'Connor, and Stevens, JJ concurring)(Brennan and Marshall, JJ, dissenting). *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring).

This Court has emphasized:

> "[v]*oir dire* plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and

evaluate the evidence cannot be fulfilled." *Rosales-Lopez v. United States*, *supra* at 188.

If the jury selection process in this case withstands constitutional scrutiny, the "critical function" played by *voir dire* is negated, and federal jurors nationwide can be chosen in a matter of minutes by asking a handful of mechanical questions in cases involving the most controversial defendants. Only prospective jurors willing to aggressively assert prejudice will be excused.

III. Defendants Were Denied The Right To Present Their Defense

Probably the most traumatic moment in the short history of these shocking proceedings from indictment to conviction was the district court's granting of the government's motion *in limine* the day after defendants received it. Defendants had no opportunity to file a written response, and only a limited opportunity to address the motion, among eight others the court permitted defendants to argue.

Once the corporations which owed the debts were seized by the United States' unprecedented use of the involuntary bankruptcy process, repayment was legally precluded, yet defendants were prevented from developing this defense before the jury. In addition, the defendants intended to present evidence that the government had acted to cause contributors and lenders to cease their relationship with defendants and their associates, yet the court again curtailed this defense. However, since it is relevant to a charge of securing loans by fraud with the intention of not repaying them to show that the ability to repay was frustrated by the government or others, the defendants were entitled to have the jury consider such evidence.

The district court had no basis for denying defendants the right to present these defenses and show government interference except for its prejudgment. Only when evidence was offered could the court determine its relevance or whether Rule 403 balancing should result in its exclusion, yet, the court ruled out whole categories of evidence by its pretrial order. The injury to defendants was further compounded when the court denied their motion for relevant evidence in the government's possession which would have demonstrated the government's interference with defendants' fundraising, sales and/or other political activities.

The basis for this important Sixth Amendment right to present a defense is described in a famous case involving a President of the United States, a first among equals before the law:

> ". . . The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence." *United States v. Nixon*, 418 U.S. 709 (1974)

Here, the trial court's consistent desire to elevate speed and docket control over the rights of criminal defendants meant it equated critical defense evidence with mere diversions whenever such evidence threatened to slow down the rapid pace of trial, and the Court of Appeals likewise considers such matters to be "distractions." (A. 21-22) The manner in which the district court shackled the Petitioners in the instant case is particularly egregious because, rather than finding that the evidence at issue was irrelevant, it utilized F.R. Evid. 403 to exclude much of the evidence.

In our system the jury, not the judge, is the trier of fact. It is not the function of the judge to pre-screen the defense case so that the jury only hears what the court deems credible or appropriate. While the prosecution argued that the defendants' claim of government harassment was merely a "smokescreen" and just "the latest excuse" for non-payment of the loans, those were matters for the jury to decide. As this Court stated in *Washington v. Texas*, 388 U.S. 14 (1967), the right to present a defense includes "the right to present the defendant's version of the facts as well as the prosecution's to the jury *so it may decide where the truth lies.*" *Id.* at 19 (emphasis supplied).

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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May 17, 1990

89-1785

No. _____

Supreme Court, U.S.
FILED
MAY 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LYNDON H. LAROUCHE, JR.,
WILLIAM WERTZ, EDWARD SPANNAUS,
MICHAEL BILLINGTON, DENNIS SMALL,
PAUL GREENBERG and JOYCE RUBINSTEIN
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 89-5518

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

LYNDON H. LAROUCHE, JR.; WILLIAM WERTZ; EDWARD SPANNAUS; MICHAEL BILLINGTON; DENNIS SMALL; PAUL GREENBERG; JOYCE RUBINSTEIN
Defendants-Appellants

and

Amici Curiae

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., Chief District Judge. (CR-88-243-A)

Argued: October 6, 1989 Decided: January 22, 1990

Before HALL and MURNAGHAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Ramsey Clark (RAMSEY CLARK & LAWRENCE SHILLING, on brief); Odin Phillips Anderson (Robert L. Rossi, ANDERSON & ASSOCIATES, P.C.; R. Kenly Webster, Thomas C. Hill, Gadi Weinrich, SHAW, PITTMAN, POTTS & TROWBRIDGE; Brian P. Gettings, COHEN, GETTINGS, ALPER & DUNHAM; James C. Clark, LAND, CLARK, CARROLL & MENDELSON; Edwin Williams, KELLOGG, WILLIAMS & LYONS, on brief) for Appellants. Kent S. Robinson, Assistant United States Attorney (Henry Hudson, United States Attorney; John J.

E. Markham, III; Mark D. Rasch, Special Assistant United States Attorney, on brief) for Appellee. (William P. Robinson, Jr., ROBINSON, ZALESKI & LINDSEY, on brief) for Amicus Curiae. (Maitre Jacques Stul; Edward de Grazia on brief) for Amicus Curiae. (Lennart Hane; James R. Mann on brief) for Amicus Curiae. (Edwin Vieira, Jr. on brief) for Amici Curiae. (Charles E. Rice; Jay Alan Sekulow, Thomas P. Monaghan, Christine Kasun, AMSHOFF, AMSHOFF & MONAGHAN, on brief) for Amici Curiae. Maitre Jean-Marc Varaut; James R. Mann on brief) for Amici Curiae. Professor Dr. Albert Bleckmann; James R. Mann on brief) for Amicus Curiae. (Professor Dr. Hans Richard Klecatsky; Professor Dr. Wolfgang Waldstein; James R. Mann on brief) for Amici Curiae. (R. David Pembroke on brief) for Amici Curiae.

MURNAGHAN, Circuit Judge:

On Friday, October 14, 1988, a federal grand jury in the Eastern District of Virginia, Alexandria Division, handed down a thirteen-count indictment against Lyndon LaRouche, Jr., Edward Spannaus, William Wertz, Michael Billington, Dennis Small, Paul Greenberg, and Joyce Rubinstein. Count One was Conspiracy to Commit Mail Fraud, on which all of the defendants were charged; Counts Two through Twelve were various counts of mail fraud charged to various defendants; and Count Thirteen was Conspiracy to Defraud the Internal Revenue Service, on which only LaRouche was charged. On December 16, 1988, a jury in the United States District Court for the Eastern District of Virginia found the seven defendants guilty on all of the counts with which they had been charged.

The convictions and sentences are before us on appeal. The defendants claim that the district court did not afford them a fair trial. Specifically, they contend that: (1) the district court erred in denying their motion for a continuance of the trial date; (2) the district court erroneously denied their

discovery request for exculpatory material; (3) the district court made numerous evidentiary rulings, *in limine* and at trial, that unconstitutionally restricted their ability to defend against the charges; (4) the trial judge failed to conduct a *voir dire* sufficient to impanel an unbiased jury and improperly failed to excuse several jurors for cause; (5) the mail fraud counts were improperly joined with the tax conspiracy count; (6) the sentence imposed on LaRouche was excessive; (7) the district court erroneously instructed the jury on the tax count; and (8) the district court erred in allowing the introduction of illegally seized evidence. The defendants also maintain that the evidence introduced at trial was insufficient to sustain the convictions of LaRouche and Spannaus on all counts and of some of the defendants on several counts. After carefully reviewing the case, we find no basis for disturbing the defendants' convictions and the sentences imposed upon them.

I. THE FACTS

The government sought to prove that the seven defendants, acting through the National Caucus of Labor Committees ("NCLC") (also known as "the LaRouche Organization"), fraudulently solicited loans from contributors. Specifically, the government alleged that the defendants promised to pay back borrowed funds at specific times and at stated interest rates when they knew such loans would not be so repaid, and that they promised the lenders that the funds would be used for specific purposes even though the funds were not to be so used. Furthermore, the indictment charged that LaRouche conspired to defraud the Internal Revenue Service.

A. The NCLC

LaRouche, a candidate for the Democratic Presidential nomination in 1980 and 1984 and an independent candidate

for President in 1984, headed the NCLC. The NCLC supported various political candidates and initiatives and published numerous books and periodicals. The NCLC had offices across the country and carried out many of its activities through commercial corporations and political committees.

LaRouche controlled the NCLC, including its fundraising operations and its finances. Daily operations of the NCLC were governed by the National Executive Council ("NEC"), which consisted of 13 LaRouche associates.

William Wertz, a member of the NEC, was in charge of fundraising for the NCLC. Edward Spannaus, also a member of the NEC, helped the NCLC on legal matters. Michael Billington and Dennis Small were telephone fundraisers for the national office of the NCLC. Paul Greenberg was in charge of fundraising for the Chicago office. Joyce Rubinstein was a fundraiser in the New York office.

B. The Fundraising

In 1983, LaRouche, who was becoming increasingly dissatisfied with the fundraising performance of some of NCLC's offices, promoted William Wertz, who had headed the successful West Coast fundraising offices, to the NEC and placed him in charge of national fundraising. LaRouche's dissatisfaction also precipitated aggressive fundraising tactics.

One former LaRouche associate testified that LaRouche, at an NEC meeting, expressed his dissatisfaction with fundraising and his belief that members of the organization were not "getting tough enough with the general population." Allegedly, LaRouche characterized adequate fundraising as essential to get him to the White House and without his presence in the White House, there was "no hope for mankind." Another LaRouche associate testified that LaRouche exhorted

to NCLC members that "the human race was on the verge of destruction or self-destruction as a result of its imbecility, its sheeplike quality, and that it lacked itself the moral fitness to survive." Because he needed funds to save humanity, LaRouche was said to have told NCLC members that "any means short of thievery or thuggery [was justified] to raise that money."

Pugnacity apparently became the theme of the LaRouche Organization's fundraising tactics. A former LaRouche fundraiser testified that when he started on a phone team, he was told as follows:

> You have to have only one thing on your mind. That is getting the money. No matter what the person you are talking to says, get the money. If you are talking to a little old lady and she says she is going to lose her house, ignore it. Get the money. If you are talking to an unemployed worker who says he has got to feed . . . a dozen children, forget it. Get the money. Most of these people are immoral anyway. This is the most moral thing they have ever done is to give you money.

Fundraisers began working very long hours and complained of "being driven into the ground."

LaRouche and Wertz set high fundraising goals for the organization, for each office, and for each individual fundraiser. LaRouche was said to have blamed the fundraisers' inadequacy on "sexual impotence." Wertz and regional fundraising supervisors reacted angrily to fundraising shortfalls and the individual fundraisers, when failing to meet established quotas, became hysterical, distraught, and depressed.

Fundraisers began to take loans, as opposed to donations, from contributors in ever increasing amounts. In 1984 and

1985, the amount that the LaRouche Organization borrowed from contributors increased dramatically; more than $25 million was borrowed from contributors in those two years alone.

C. The Borrowing

It was the way that those borrowed funds were obtained that concerned the government prosecutors. The government alleged that LaRouche communicated to his organization a "forgive and forget" policy, whereby fundraisers would initially try to persuade individual lenders to convert their loans into contributions. Lenders who still demanded payment would not be repaid. One former LaRouche fundraiser testified that Wertz characterized lenders, who asked for the return of their money, as immoral. According to the government, the nonpayment policy did have two exceptions: (1) if alienating the lender might result in significant adverse political consequences; or (2) if the lender was going to file suit.

The government sought to prove that potential lenders heard quite a different story from the organization's fundraisers: they were told that their money would be safer with the LaRouche Organization than with a bank and that they would be repaid on specific terms, at specific rates of interest; the lenders were never told of the organization's financial difficulties; and even when some of the lenders became disgruntled, they were assured of repayment. Many lenders lost significant amounts of money. Furthermore, the government introduced evidence at trial to prove that the defendants knew of the falsity of the repayment and interest representations.

D. The Conspiracy to Defraud the Internal Revenue Service

In addition, the government charged LaRouche with conspiring to defraud the Internal Revenue Service ("IRS"). It

sought to prove that the LaRouche Organization compensated LaRouche by maintaining his lifestyle, including the costs of his housing, food, furniture, and clothing, rather than by paying him a salary. In addition, the government alleged, a variety of affirmative steps were taken by LaRouche and associates to conceal some of the payments and to characterize others as gifts. Among other things, LaRouche did not file income tax returns for the calendar years 1980, 1981, and 1982, the period during which the alleged conspiracy occurred.

E. The Boston Trial

An indictment was issued by a federal grand jury in Boston, Massachusetts, on October 6, 1986, against the LaRouche Organization and several of its associates. In July 1987, a second superseding indictment added LaRouche as a codefendant in the Boston case. The Boston indictment charged the NCLC, along with LaRouche, Spannaus, and others, with participating in a conspiracy to obstruct justice and to impede a federal investigation into fraudulent fundraising practices. The LaRouche Organization and thirteen LaRouche associates were also charged with scheming to commit credit card fraud and to obtain fraudulent loans. Jury selection for the Boston trial began in September 1987 and the Boston trial began on December 17, 1987. On May 4, 1988, after four months of trial, Judge Robert E. Keeton declared a mistrial due to "severe hardships" that would be suffered by four of the jurors if the trial continued. A retrial in Boston was set for January 3, 1989.

F. The Virginia Proceedings

After the thirteen-count indictment came down in the instant case on October 14, 1988, Judge Bryan held arraignment on October 17 and scheduled the trial to commence on

November 21. At arraignment, the defendants filed a motion to transfer the trial to Boston due to the similarity in parties, charges, and proof. According to the defendants, the Virginia indictment was very similar to the Boston indictment and was designed to achieve the same law enforcement objectives. On October 21, 1988, the district court denied the defendants' motion to transfer the case to Boston. The defendants filed many other pretrial motions, most of which were denied.

Trial commenced on November 21, 1988. Among other witnesses, ten disgruntled lenders testified at the trial. None of the defendants took the stand. On December 16, 1988, after a four-week trial, the jury returned verdicts of guilty on all of the counts with which the defendants had been charged.

LaRouche was sentenced to a term of imprisonment of five years as to each of the thirteen counts of conviction. The court ordered counts 1 to 4, 5 to 9, and 10 to 13 to run concurrently, so that LaRouche was sentenced to a total period of incarceration of fifteen years. Wertz and Spannaus were each fined $1,000 and ordered to serve five years imprisonment. Billington, Small, Greenberg, and Rubinstein were each sentenced to three years imprisonment and ordered to pay various fines.

II. SUFFICIENCY OF THE EVIDENCE

We first evaluate the defendants' arguments that there was insufficient evidence to find LaRouche and Spannaus guilty on any count and to find any of the defendants guilty on several counts. The relevant question is "whether, viewing the evidence in the light most favorable to the government, *any* rational trier of facts could have found the defendant[s] guilty beyond a reasonable doubt." *United States v. Tresvant*, 677 F.2d 1018, 1021 (4th Cir. 1982) (emphasis in original).

A. Mail Fraud

The criminal mail fraud statute proscribes the utilization of the mails in furtherance of a scheme to defraud or to obtain money by means of false pretenses, representations, or promises. 18 U.S.C. Sec. 1341 (1982).

LaRouche argues that no evidence exists to implicate him in NCLC's fundraising activities, which the jury found to be fraudulent. LaRouche's claim is contradicted by the record. Testimony was introduced to show that LaRouche controlled the fundraising activities of the organization and that he was well aware of its financial difficulties. Testimony also evidenced LaRouche's demands for more aggressive fundraising tactics. The government introduced evidence that, after an inquiry about disgruntled lenders' demands, LaRouche responded, "Forgive or forget," thereby creating a policy of the nonpayment of loans. The government also exhibited a letter that LaRouche sent to a lender in which he blamed the nonpayment of her loan on "wicked operations by adversaries" and claimed that the entity responsible for repaying her loan had no discretion in the matter; other evidence showed that his claims in the letter were false. Sufficient evidence supports the jury's conclusion that LaRouche participated in the organization's fraudulent fundraising practices.

The record also fully supports Spannaus' conviction. Through the notes in his notebook, evidence of his involvement in the formulation of the nonpayment policy exists. The government also presented evidence that: Spannaus responded to one lender complaint stating that the lender had no right to get his money back; and Spannaus wrote letters to lenders assuring them that the repayment program had been restored and issued letters of indebtedness stating that loans would be repaid at stated times and rates, even though he knew of the campaign's nonpayment policy.

The defendants argue that there was not enough evidence to convict them of defrauding lender Martha Van Sickle, who lent the LaRouche organization $250,000, because none of the representations they made to her were false. While the funds that Van Sickle lent were used for the purpose stated to her, Van Sickle testified that she was also falsely told that she would be paid in the usual manner, over a two-year period at ten percent interest *per annum*, and that she was not informed of events, which occurred prior to the loan, that would greatly hinder the defendants' ability to repay the loan. The evidence supports the jury's conclusion that representations made to her were false.

It is also argued that defendant Small was not adequately involved with the solicitation of a $15,000 loan from lender Goodwill Post to be convicted on Count 10. But testimony demonstrated that Small had met with Post to solicit the loan and that, after Post made the loan, Small was credited with helping to obtain it. The evidence is more than sufficient to implicate Small in soliciting the loan made by Post.

The defendants contend that the convictions cannot stand on Count 11 because it charged fraud with respect to a $10,000 loan from lender Max Harrell, who had been informed of the risks. But the record contains sufficient evidence for the jury to find that Harrell was assured falsely that he would be paid back. The defendants argue that no evidence supports Count 12, which charges LaRouche with making false statements in a letter sent to lender Elizabeth Sexton. But evidence shows that, contrary to LaRouche's statements in the letter, the responsible entity did have the discretionary funds to repay the loan.

B. Tax Fraud

LaRouche maintains that he could not have been convicted of Conspiracy to Defraud the IRS because no evidence

was introduced to demonstrate that he had the requisite state of mind—an intent to defraud. Rather, he argues, evidence showed that he relied on the advice of tax experts. In fact, an expert witness testified to the view that he owed no taxes. Thus, LaRouche maintains, although it is arguable whether he did indeed owe taxes, it cannot be inferred that he intended to defraud the IRS.

The government introduced the following evidence:

(1) LaRouche received compensation in kind from a publishing company, even though he was not an employee;

(2) the LaRouche Organization maintained real estate for LaRouche that he and his wife referred to as "residences";

(3) the LaRouche Organization used a security fund to pay essentially all of LaRouche's personal expenses, including clothing and jewelry;

(4) when LaRouche redesigned the accounting system, he did not attempt to compile separate accounting of personal expenses;

(5) one of LaRouche's advisers wrote a memo proposing to characterize payments made to LaRouche as gifts, showing how it would affect tax liability;

(6) LaRouche and his associates justified certain payments to LaRouche by calling them "gifts";

(7) LaRouche did not file tax returns, although on two occasions an accountant had prepared returns that were not filed; and

(8) the IRS had sent LaRouche a series of notices requesting that he file returns, but no reply was ever received.

The evidence is sufficient to support the jury's conclusion that LaRouche intended to defraud the IRS.

III. DENIAL OF MOTION FOR CONTINUANCE

At the arraignment on October 17, 1988, Judge Bryan scheduled the trial to commence five weeks later, on November 21. The only response from defense counsel was a concern expressed by one local counsel that he would be starting another trial near that date. Judge Bryan responded, "If that is the only reason for not using November 21st, we will keep it on November 21st." Defense counsel expressed no concerns that the trial would come too soon. When one defense attorney stated that the ten-day filing deadline for motions might be hard to make, Judge Bryan extended it to twenty days.

On November 4, eighteen days after the arraignment at which the trial had been scheduled, the defendants moved for a continuance of the trial date. The defense counsel argued to the district court that a continuance was necessary to allow a review of the voluminous amount of documents in the case and requested that the trial be put off until January 18, 1989. But the defense also mentioned that the Boston trial was commencing on January 3, 1989, and that conflicts might be created if the continuance was granted. The government pointed out to Judge Bryan that most of the evidentiary materials had been available to at least three of the defendants throughout the pendency of the Boston indictment, which had exceeded 18 months.

Judge Bryan denied the defendants' motion for a continuance. Although he recognized that the amount of documents in the case might impose a hardship on defense counsel, he reasoned that the extra work did not warrant a continuance. Factored into his decision was that "[m]ost of these defendants

and most of these counsel have been involved in this case long before this indictment came down." The defendants filed a petition for a writ of mandamus with the Fourth Circuit to reverse Judge Bryan's denial of the motion for a continuance. On November 17, 1988, we denied the petition for mandamus.

The defendants renewed their motion for a continuance of the trial date and filed an accompanying written memorandum. On November 18, 1988, Judge Bryan declined to hear any further oral argument on the renewed motion and denied it.

The defendants contend that the district court's denial of the motion for a continuance forced the defense lawyers to go to trial in a state of unreadiness. The resulting constraint, they argue, denied them their sixth amendment rights to effective assistance of counsel and their fifth amendment rights to due process.

In order to prove an abridgment of the sixth amendment right to effective assistance of counsel based on an allegedly wrongful denial of a continuance, a defendant must first demonstrate that the district court "abused its discretion" in denying the motion. *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983); *United States v. Lorick*, 753 F.2d 1295, 1297 (4th Cir.), *cert. denied*, 471 U.S. 1107 (1985); *Hutchins v. Garrison*, 724 F.2d 1425, 1432 (4th Cir. 1983), *cert. denied*, 464 U.S. 1065 (1984). Second, the defendant must show that the denial "specifically prejudiced" the defendant's case. *Lorick*, 753 F.2d at 1297; *Hutchins*, 724 F.2d at 1434. That is, in the absence of circumstances giving rise to a presumption that the defendant's case was prejudiced, the defendant must point to specific errors made by defense counsel that undermine confidence in the outcome of the trial. *United States v. Cronic*, 466 U.S. 648, 660-61, 666 (1984) (when court refuses to postpone trial, only "inherently unfair" circumstances give rise to presumption of

prejudice, such as actual or constructive denial of counsel's assistance); *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *see also Slappy*, 461 U.S. at 27 (Brennan, J., concurring) (requiring showing of prejudice is appropriate for "ineffective assistance" claims because attorney's performance can be assessed, as opposed to situations in which denial of continuance results in attorney absence). The due process analysis, in this context, merges into the sixth amendment analysis; if the district court's wrongful denial of a continuance did not prejudice the defense's ability to prepare, it cannot otherwise be said here that the court deprived the defendants of a fair trial.

Application of the foregoing framework to the facts of the case leads us to conclude that the district court did not "abuse its discretion" in denying the defendants' motion for a continuance. Moreover, even assuming that the judge did abuse his discretion, the defendants have not shown a "specific prejudice" as a result of the denial of their motion for a continuance.

A. Abuse of Discretion

Defendants contend that only "three of the seven counsel had engaged in any prior representation which was useful in understanding the nature of their client or the case," and any resulting partial familiarity was outweighed by the vast amount of material involved in such a complex case. Thus, they maintain that the district court abused its discretion in allowing them *only 34 days* from arraignment to the commencement of trial.

The Supreme Court has defined "abuse of discretion" in the context of a denial of a motion for continuance as "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for a delay." *Slappy*, 461 U.S.

at 11-12. The Supreme Court has also indicated that the test for whether a trial judge has "abused his discretion" in denying a continuance is not mechanical; it depends mainly on the reasons presented to the district judge at the time the request is denied. *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964).

The Supreme Court has opined that a broad and deferential standard is to be afforded to district courts in granting or denying continuances: the burdensome task of assembling a trial counsels against continuances, and, therefore, the trial courts must be granted broad discretion. *Slappy*, 461 U.S. at 11. Furthermore, the district court alone has the opportunity to assess the candidness of the movant's request. *Ungar*, 376 U.S. at 591; see also *United States v. Hutchison*, 352 F.2d 404, 405 (4th Cir. 1965) (granting continuance within sound discretion of trial judge; reasonable latitude must be allowed).

In *Badwan v. United States*, 624 F.2d 1228 (4th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981), we addressed a claim that a trial court's denial of the defendants' motion for a continuance unduly prejudiced their case. The defendants argued that because their lawyer had been retained less than one month before trial and the case was exceedingly complex and document-intensive, he was not adequately prepared for trial. *Id.* at 1230-31.

We rejected the defendants' argument, reasoning that principally because the defense lawyer had remained silent when the trial date was announced and did not move for a continuance until eight days later, the district judge did not abuse his discretion. *Id.* at 1231. The later that a motion for a continuance is made, the more likely it is made for dilatory tactics; hence, it is less likely that the district court arbitrarily denied the continuance. *Id.*

Other than in an extreme case, a reviewing court has a seemingly impossible task in discounting the substantive

complexity of a case by the number of days available for preparation (and factoring in the prearraignment experience of each of the lawyers) in order to determine whether the district court abused its discretion in denying continuance of the trial date. Such a quandary helps to explain the Badwan Court's emphasis on the process with which the judge conducted the trial rather than relying solely on an evaluation of the substantive complexity of the case.

An evaluation of the process here indicates that Judge Bryan did not "abuse his discretion." When Judge Bryan denied the defendants' motion for a continuance, he possessed a highly relevant piece of information: the defense waited eighteen days to move for a continuance. Defense counsel's prolonged silence leads to the reasonable inference that 34 days was not a clearly insufficient period of time between arraignment and trial. The fact that the defendants submitted, on the day of arraignment, a transfer motion with a 98-page analysis demonstrating the similarity between the Virginia indictment and the Boston indictment buttressed that inference. Not so much because it was affirmative proof that the cases were sufficiently similar, but because it was pertinent information showing the district court judge that the lawyers who implicitly acquiesced to his initial scheduling of the trial were well familiar with the nature of the charges, the government's evidence, and what effort a good defense would require. In the face of such silence, it cannot be said that the time allotted for trial was clearly unreasonable.

Furthermore, Judge Bryan considered the amount of preparation required but concluded that the prearraignment experience of the lawyers with the defendants and the Boston indictment somewhat mitigated his concern.[1] In addition,

[1] Appellants contend that because the district court, eleven days before trial, granted the government's motion *in limine*, *see infra*, the resulting necessary revision of the defense strategy "drastically increased" the need

granting a sixty-day continuance would have created a conflict with the Boston trial, which was scheduled to begin on January 3, 1989.

It is evident that Judge Bryan did not make an "unreasoned and arbitrary demand for expeditiousness." We hold that the district court did not abuse its discretion in denying the defendants' motion for a continuance. Even assuming, however, that the district court did abuse its discretion, the defendants fail to show the second element required for the reversal of their convictions: specific prejudice.

B. Specific Prejudice

The defendants argue that they were prejudiced at trial due to the lack of adequate preparation time in four different ways. They claim that the rush to trial: (1) contributed to the inability of any of the defendants to take the stand as they were not adequately prepared; (2) caused an inability to cross-examine the government's witnesses in an adequate manner; (3) inhibited the defense from interviewing and preparing favorable lenders to testify; and (4) prevented the defense from adequately preparing their expert witness to testify as to the economics of the organization and the tax fraud count.

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for a continuance. However, that point is irrelevant because it was never presented to the district court. The defendants' "Renewed Motion for Continuance of Trial Date," filed on November 16, only reiterated the grounds that Judge Bryan had already considered on November 4, 1988; it did not mention a necessary strategic revision. When the defense counsel asked to argue that motion orally, Judge Bryan declined to hear the arguments. He thought it would be unduly repetitive. The defense lawyer, in asking Judge Bryan to reconsider denial of continuance, even said, "I know Your Honor has heard us fully." It could not have been error for Judge Bryan to refuse to hear oral argument on the subject again. Because the needed strategic revision was never presented to Judge Bryan, its existence is irrelevant in deciding whether Judge Bryan abused his discretion in denying the defendants' renewed motion for a continuance.

As to the defendants' first claim of prejudice, they do not *specifically* identify why they could not take the stand. More than a general allegation of "we were not prepared" is necessary to demonstrate prejudice.

The defendants also fail to point to specific instances of shortfall in their lawyers' cross-examination that was flawed due to the denial of the continuance. Only one specific claim of lawyer error is made: further investigation revealed that two loan victims extended their loans so that they were not yet due at the time of trial. Yet even this assertion remains unsubstantiated.

As to the defendants' claim that they did not have time to find, interview, and prepare lenders who would have been favorable witnesses, their briefs again remain silent as to the names of such witnesses who have since been identified. We have previously held that "post-hoc assertions by counsel that given more time something might have turned up" will not suffice to demonstrate prejudice. *Badwan*, 624 F.2d at 1231.

Finally, the claimed defects in their expert's testimony do not establish prejudice. The defendants argue that the expert failed to rebut the government's contentions in several areas but they do not demonstrate that the shortcoming resulted from the lack of adequate preparation time rather than the merits of their case. The briefs are silent as to, specifically, how the expert could have testified to the contrary.

The defendants simply fail to point to specific errors made by their lawyers that resulted from the lack of adequate preparation time. While they allege that many areas of the defense could have been improved, they do not specifically state how such improvement could have been accomplished. Even assuming that the district court abused its discretion in denying a continuance, reversal of the defendants' convictions would be contrary to the Supreme Court's holding in *United*

States v. *Cronic*, 466 U.S. 648 (1984). *Cronic* mandates the identification of specific prejudice when claiming ineffectiveness of counsel due to lack of preparation time. *Id.* at 666.

IV. DENIAL OF DISCOVERY REQUEST

Prior to trial, the defendants filed a 182-item motion for the disclosure of exculpatory information requesting, among other things, all reports and comments regarding interviews with contributors, lenders, or other witnesses, including the identification of the source from which the government obtained the name of the person. Judge Bryan denied the motion, reasoning that the request was overbroad and that the discovery already provided by the government had been adequate.

The defendants argue only that they filed a discovery request, that it was denied, and that the denial was improper. They do not state why the ruling was incorrect except that the requested information was relevant. Defendants do not state whether the ruling violated their constitutional rights or the Federal Rules of Criminal Procedure. They make no attempt to prove the claim in light of *Brady* v. *Maryland*, 373 U.S. 83 (1983), and its progeny. They merely state that Judge Bryan's ruling was incorrect.

Criminal defendants do not have a "general" constitutional right to discovery. *Weatherford* v. *Bursey*, 429 U.S. 545, 559 (1977). For example, an item that the government is required to provide must not only be exculpatory but also "material in the sense that its suppression undermines confidence in the outcome of the trial." *United States* v. *Bagley*, 473 U.S. 667, 678 (1985). Without a more detailed argument of why the district court's ruling was incorrect, it is extremely difficult to evaluate whether their claim was meritorious, particularly when the extent of consensual discovery between the parties is not readily apparent from the record.

Judge Bryan did not deny the request because none of the items were properly discoverable; rather, he denied the request because the government had already provided all of the relevant and material information requested. For example, the government had agreed to provide any information relating to any actual interference with the defendants' ability to repay their borrowings. The defendants fail to explain how any of the requested material, aside from the discovery that had already occurred, is material, or even relevant. Judge Bryan did not abuse his discretion in denying the defendants' discovery request.

V. THE DISTRICT COURT'S EVIDENTIARY RULINGS

The district court partially granted the government's motion *in limine* to exclude evidence that the United States government was the creditor who initiated involuntary bankruptcy proceedings of LaRouche organizations, although evidence of the involuntary bankruptcy was permitted. It did so also as to evidence regarding law enforcement and intelligence activities directed at the LaRouche Organization, except that the defendants were able to introduce evidence of unexpected actions by some outside influence, including the government, that had the effect of frustrating the defendants' expectation that the lenders would be repaid.

The order was granted to prevent the defendants from introducing into the trial claims such as government harassment, vindictive prosecution, and financial warfare. As the government pointed out in its motion, the only "real" jury issues stemming from the charges—fraudulent solicitations of loans made on false promises that the loans will be repaid at certain times and at specific rates—were: (1) the content of the solicitations; (2) the falsity of the solicitations; and (3) the defendants' knowledge of the content of the solicitations and

the falsity. Hence, to the extent that alleged outside influences did not affect the defendants' expectation that the loans would be repaid, such evidence was excluded. As far as the identification of the United States government as the creditor who initiated involuntary bankruptcy, the court thought that any potential relevance was outweighed by the distraction that the inquiry would cause the jury, including collateral issues such as the nature of the debts owed to the United States.

The defendants argue that the order prevented them from introducing "evidence concerning long-standing efforts by the government, including the FBI and CIA, to infiltrate, investigate and conduct COINTELPRO-like operations against LaRouche." The defendants contend that evidence of expected government actions should not be prohibited because the defendants should not have to tolerate such government actions. But as the district court correctly concluded, the only possible relevance of any of the government's activities to the present case was to show that they unexpectedly affected the defendants' belief that the loans would be repaid.

The defendants also contend that, even with respect to unexpected government actions, the court improperly limited the extent to which such evidence could be introduced. But, as written, the court's limitation is nothing more than a rewording of Federal Rule of Evidence 403. Judge Bryan ordered that "the court will not allow a delving into any details of alleged infiltration . . . for the reason that . . . this would divert the jury from the issues raised in the indictment." At trial, the defendants point to only one circumstance in which they were not permitted to show government interference with a satisfied lender.[2] The defense lawyer argued that the

[2] All of the other objections made by the government to which appellants refer in their brief are instances in which the judge overruled the government's objections.

lender was telephoned by "somebody who identified himself as an FBI agent" and who "suggested to [the lender] that he was maybe dissatisfied with the LaRouche Organization." The judge did not abuse his discretion in sustaining the government's objection and concluding that the testimony's probative value was substantially outweighed by the distraction it would cause.

The defendants also argue that they should have been allowed to introduce evidence that the government was the party who initiated bankruptcy proceedings. They contend that, otherwise, the jury might think that disgruntled lenders initiated the proceeding. The government asserts that if the identity of the petitioning creditor had been introduced, the government then would have had to introduce evidence regarding the amount and nature of the debts that the LaRouche Organization owed to the United States.

It is questionable whether the identity of the petitioning creditor is relevant at all. The district judge did not abuse his discretion in concluding that any relevance was outweighed by the resulting distraction caused by the collateral issues. Furthermore, the defendants violated the order and did introduce evidence that the government initiated the bankruptcy proceedings; hence, no prejudice could have possibly resulted from the court's *in limine* ruling.

The defendants also contend that they should have been permitted to establish at trial that the NCLC was a *bona fide* political organization. But the government told the jury that the defendants' political activities should not be considered and the court instructed the jury that political association was constitutionally protected. The political nature of the organization was irrelevant to the case.

Finally, the defendants assert that they should not have been prevented from introducing at trial evidence of threats

made to LaRouche and others. But the validity of providing security to LaRouche was never at issue. Rather, the government questioned the classification of certain expenses as "security," such as clothing, shoes, and jewelry. The court's evidentiary rulings were proper.

VI. JURY SELECTION

Judge Bryan conducted the *voir dire* for jury selection as follows:

(1) He started with a 75-person panel. Each juror filled out forms, accessible to the defendants, including personal data and information about occupation, employer, criminal record, and prior jury service.

(2) 28 people were excused on hardship grounds; 47 veniremen remained.

(3) He put a question to the group as a whole: Have you "read or heard or seen anything that has caused you to form an adverse opinion or belief about any of these defendants or about their guilt or innocence of the charges in this case?"

7 people responded and were excused; 40 veniremen remained.

(4) He put another question to the group as a whole: "Have any of you read or heard or seen anything about this case?"

28 people responded; each was individually questioned.

Following is a very typical example of the individual questioning of each that occurred at the bench:

The Court: Do you remember what it was you read or heard?

The Juror: There was an article yesterday in the Post, I believe, about the indictment and about starting the trial today. Also, some advertisements that were made by one of the defendants recently in the paper.

The Court: As a result of what you read or heard have you formed any opinion as to whether these defendants are guilty of the crime in this case?

The Juror: Not particularly, sir.

The Court: Even if not particularly —

The Juror: No.

The Court: In any way, sir?

The Juror: No, sir.

The Court: Do you think you could decide the case based on what you hear here in Court as opposed to anything you may have read about the case?

The Juror: I feel I could do my best, yes.

The Court: Do you think you could give these defendants just as fair a trial as you could if you hadn't read or heard anything about it?

The Juror: Yes.

The Court: All right, you may step down, sir.

After the individual questioning of 18 people, 7 more were excused; 33 veniremen remained.

(5) Defendants asked the judge about one woman who had not been certain when asked individual questions. The judge excused the woman; 32 veniremen remained.

(6) The judge inquired whether any juror knew any of the lawyers in the case, was connected with any relevant organizations, or knew the alleged victims. No one responded.

(7) The judge asked if any juror or any member of their families worked for a law enforcement agency.

10 responded, and each was asked about the specifics of their association with law enforcement, and whether they could remain impartial notwithstanding their relation or affiliation.

1 man with the CIA was excused.

(8) The court asked: "Do any of you harbor any resentment or feeling or prejudice against these defendants which would in any way deny them a fair and impartial trial, even though they might not have technically been within the questions I have asked? Are there any persons who harbor any form of feeling against any of these defendants that would in any way deny them a fair and impartial trial? Do you have any belief or opinion that the charges against these defendants are unique in the sense that they should be pursued with extraordinary vigor, that they shouldn't constitute an offense, or that they might carry penalties which you would consider improper? Do you know of any reason whatsoever why you cannot sit with absolute impartiality to both the Government and the defendants as trial jurors in the case?"

(No response).

(9) After objections from the defense, the judge decided to excuse two computer specialists employed by the IRS even though both stated that they could remain impartial.

(10) The defendants then exercised their peremptory challenges (each side was given 10): the government used two and the defendants used nine. Twelve jurors were impaneled.

(11) When picking three alternates from the remaining five veniremen, the government decided not to use its challenges so that the defendants could have two more peremptory challenges. Three alternate jurors were selected.

Defendants challenge the jury selection process, claiming that (1) the *voir dire* was inadequate to uncover juror bias, and (2) the judge improperly failed to excuse three jurors for cause thereby forcing them to use their peremptories to cure the court's mistake.[3]

Regarding the adequacy of *voir dire*, the defendants contend that more jurors should have been individually questioned to determine whether they harbored any bias toward the defendants. The district court only individually questioned jurors who had seen, heard, or read anything about the case, who had worked for, or had a family member work for, a law enforcement agency, or who had an accounting or tax background. Hence, the judge only put the question to the group as a whole whether they harbored a bias toward

[3] The defendants also complain that juror Buster Horton was impaneled without ever answering an individual question, and, as an employee of the United States Department of Agriculture, an agency that has received extensive criticism from LaRouche, the possibility that he was biased is substantial. However, the defendants had access to Horton's employment data and should have notified the court as to its perceived significance.

the defendants because of impressions other than pretrial publicity and law enforcement association.

At the conclusion of *voir dire*, Judge Bryan stated: "Gentlemen, I think I have asked enough questions to insure an impartial panel" and counsel approached the bench. They did not mention the perceived importance of broadening the questioning to probe individually anyone who had ever heard of LaRouche. They objected only to particular jurors and moved to strike them for cause. A reading of the *voir dire* suggests that the procedure was very interactive: the defense counsel was at the bench and gave the judge their thoughts, he considered them and often granted their requests.

Because the defense remained silent at this juncture, the government suggests that defendants waived the contention. We agree. The defendants' only possible preservation of their objection lies in the fifty-question "Proposed *Voir Dire* Questions" that the defendants submitted to the court. Although some of the proposed questions did seek to probe the potential jurors on information they had about LaRouche due to events other than the case, other questions appeared to be much less probative: *e.g.*, "Do you ever feel like getting involved in government is useless because we only know what they want us to know?"

We have previously taken the view that a specific objection or request during the *voir dire* process is required to preserve the objection for appeal. In *King v. Jones*, 824 F.2d 324 (4th Cir. 1987), the defense counsel had submitted 90 proposed questions to ask during *voir dire* but she never advised the judge which of them were necessary for an adequate *voir dire* and did not make a timely objection when the judge failed to ask the questions. *Id.* at 326. We concluded that she waived the issue even though the essential questions had been included with the others. We reasoned that otherwise a long list of questions would become a trap for an unwary judge by failing to give the judge a chance to avoid

error by calling attention to the questions that must be asked. *Id.* (citing *United States v. Blosvern*, 514 F.2d 387, 389 (9th Cir. 1975) (in criminal context, when counsel submitted list of 18 questions but did not object during *voir dire*, court declined to consider merits of objection to inadequate *voir dire* because particular questions which counsel deems essential must be given to court before jury selection is completed)). Because the judge was not given an opportunity to broaden the *voir dire* after he stated that he thought he had asked enough questions, the defendants have waived their objection.

However, even assuming the objection was properly preserved, Judge Bryan did not abuse his discretion in conducting the *voir dire*. *See United States v. Robinson*, 804 F.2d 280, 283 (4th Cir. 1986) (trial court has broad discretion in conducting *voir dire* of jury and phrasing questions asked; it is not "abuse of discretion" for court to fail in specifically probing victims of crime for potential bias); *see also Rosales-Lopez v. United States*, 451 U.S. 182, 188-190 (1981) (appellate court should not easily second-guess trial court's *voir dire*; judge must reach conclusion as to impartiality and credibility by relying on demeanor evidence and responses to questions). Judge Bryan individually questioned many panel members who had affirmatively responded to certain questions about possible exposure to bias, and relied on general questions to uncover any residual bias that might have remained; a reading of the transcript does not indicate an "abuse of discretion." The defendants recite statistics on *voir dire* time and transcript length to demonstrate that the *voir dire* was inadequate in comparison to the Boston trial. Such quantitative comparisons are unhelpful—the only issue is whether Judge Bryan's *voir dire* was sufficient to impanel an impartial jury.

The defendants also contest the district court's refusal to dismiss three veniremen for cause: (1) Andrew Mitchell, who

works in the Office of Justice Program, at the Department of Justice; (2) Lenora Chapin, whose retired husband was a former Special Agent with the FBI; and (3) John Usrey, a repairman with the FBI. Although Judge Bryan individually questioned each of them to determine if they could remain impartial in spite of their relations to law enforcement agencies, he refused to strike "for cause" all employees of investigatory agencies, particularly when their association was unrelated to an investigative function.[4] Judge Bryan's ruling is consistent with case law that refuses to establish a *per se* rule excluding any person who has had an association with an investigatory agency. *See, e.g., Smith v. Phillips*, 455 U.S. 209 (1982) (refusing to imply bias to juror who had applied for employment with prosecuting agency); *Dennis v. United States*, 339 U.S. 162 (1950) (employees of federal government not challengeable solely by reason of employment, even when defendant was prosecuted for failing to appear before Un-American Activities Committee and government employees take loyalty oath); *United States v. Malloy*, 758 F.2d 979, 981-82 (4th Cir.) (declining to establish *per se* implied bias rule when juror had served on different trial involving same offense), *cert. denied*, 474 U.S. 1009 (1985).

None of the three challenged veniremen had a direct relation to any government investigative function, and Judge Bryan's questioning to determine if they could remain impartial was sufficient to ensure an impartial jury.

VII. JOINDER OF MAIL FRAUD COUNTS WITH TAX COUNT

Judge Bryan denied the defendants' motion for severance of the tax count from the mail fraud counts. He reasoned that

[4] Upon request, the district court did strike two employees of the IRS for cause, primarily because evidence of an IRS search and investigation would become relevant.

because much of LaRouche's unreported income was derived from the alleged mail fraud, and the expenditures on LaRouche's personal needs related to the tax count as well as to the loan fraud, a sufficient nexus warranted the joinder. He also reasoned that the joinder was not sufficiently prejudicial to warrant severance.

The defendants contest the judge's finding, arguing that the prejudice resulting to the defendants was substantial because a large amount of evidence introduced at the trial would not have been admissible in both trials had there been separate trials.

Rule 8 permits joinder of offenses if they are similar in character, are based on the same act or transaction or series of transactions, or constitute parts of a "common scheme." To the extent that the proceeds from the loans, fraudulently applied to maintain LaRouche's lifestyle, also were not reported to the IRS, initial joinder was proper under Rule 8.[5]

Rule 14 of the Federal Rules of Criminal Procedure provides that a court may grant a severance from a prejudicial joinder. A trial court's decision not to sever is reviewed under the "abuse of discretion" standard. *United States v. Lane*, 474 U.S. 438, 449 n.12 (1986); *Person v. Miller*, 854 F.2d 656, 665 (4th Cir. 1988) (abuse of discretion only found when trial court's decision to deny severance results in "miscarriage of justice"), *cert. denied*, 109 S. Ct. 1119 (1989).

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[5] We have defined "transaction" very flexibly, as "implying a connection of logical relationship rather than immediateness." *United States v. Carmichael*, 685 F.2d 903, 910 (4th Cir. 1982) (obstruction of justice charges for concealing activities properly joined with charges for activities themselves), *cert. denied*, 459 U.S. 1202 (1983); *see also United States v. Porter*, 821 F.2d 968, 972 (4th Cir. 1987) ("common scheme" is "series of acts unified by some substantial identity of facts or participants"), *cert. denied*, 485 U.S. 934 (1988).

Whether Judge Bryan abused his discretion in denying the defendants' motion for a severance and concluding that there was not significant prejudice to warrant separate trials on the mail fraud and tax fraud counts must be evaluated as follows:

> The trial court must weigh the inconvenience and expense to the government and witnesses of separate trials against the prejudice to the defendants inherent in a joint trial, and its determination will not be disturbed unless the denial of a severance deprives the movant a fair trial and results in a miscarriage of justice. The movant must show something more than merely a better chance of acquittal and must overcome the burden imposed by a stringent standard of review.

United States v. Santoni, 585 F.2d 667, 674 (4th Cir. 1978) (citations omitted), *cert. denied*, 440 U.S. 910 (1979). We have also made clear that curative instructions given to the jury by the district court go a long way in eliminating any prejudice resulting from the spillover effects of joinder. *See United States v. Porter*, 821 F.2d 968, 972 (4th Cir. 1987), *cert. denied*, 485 U.S. 934 (1988).

There was substantial overlap between the mail fraud and tax charges: (1) at least 50% of LaRouche's unreported personal income stemmed from mail fraud; (2) the need to prove the LaRouche Organization's structure and control was present in both cases; and (3) expenditures made on LaRouche's behalf helped prove both that lenders were not truthfully told about the availability of funds and that LaRouche indeed had personal taxable income. Furthermore, 11 of 30 government witnesses testified as to both charges.

In addition, the judge on numerous occasions cautioned the jurors about the different counts and what evidence they

were to consider. Because of the substantial overlap in cases and the cautionary instructions issued by the court, we conclude that there was not a miscarriage of justice and that Judge Bryan did not abuse his discretion.[6] *Accord United States v. Murphy*, 836 F.2d 248, 255-56 (6th Cir.) (no prejudicial spillover effect when obstruction of justice and perjury charges joined with mail fraud charges), *cert. denied*, 109 S. Ct. 307 (1988); *United States v. Kopituk*, 690 F.2d 1289, 1318 (11th Cir. 1982) (RICO offenses not prejudicially joined with tax offenses, particularly because of policy in favor of joint trials in conspiracy cases), *cert. denied*, 463 U.S. 1209 (1983).

VIII. EXCESSIVE SENTENCE

LaRouche has appealed the fifteen-year sentence imposed on him. He claims that, under the circumstances, the sentence is impermissibly harsh; he seeks to have the sentence modified or the case remanded for resentencing. At oral argument, his counsel maintained that, in light of LaRouche's age, the sentence is a "death sentence."

Fourth Circuit precedent holds that the eighth amendment's prohibition of cruel and unusual punishment and *Solem v. Helm*, 463 U.S. 277 (1983), do not require a proportionality review of any sentence less than life imprisonment without possibility of parole. *United States v. Guglielmi*, 819 F.2d 451, 457 (4th Cir. 1987) (citing *United States v. Rhodes*,

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[6] LaRouche also claims that his fifth amendment rights were violated because his own testimony was essential to the tax count but he did not want to waive his fifth amendment rights with respect to the mail fraud counts. However, such unsubstantiated allegations are easy to make and should not control disposition of the issue. *See United States v. Gorecki*, 813 F.2d 40, 43 (3d Cir. 1987) (bare allegation that joinder prevented testimony without specific showing of what testimony might have been fails to meet stringent requirement for Rule 14 showing of prejudice).

779 F.2d 1019 (4th Cir. 1985)), *cert. denied*, 484 U.S. 1019 (1988). We recently reaffirmed the principle in *United States v. Francois*, No. 88-5110, slip op. at 6 (4th Cir. Nov. 22, 1989) (rejecting defendant's claim that 188-month sentence constituted cruel and unusual punishment as applied to first-time offender). Because the sentence cannot be considered to violate the eighth amendment, the only question is whether the district court abused its discretion in imposing the sentence.

The court only imposed sentence on LaRouche for three of the thirteen counts; it ordered that counts 1 to 4, 5 to 8, and 9 to 13 run concurrently. We find no extraordinary circumstances here that indicate an abuse of discretion.

> [S]entences imposed within the statutory limits are generally not reviewed on appeal. This Court has held that if a sentence is within the statutory limits, 'the sentence would not be disturbed unless a trial judge has *grossly abused the discretion afforded him*.' This Court has consistently endorsed the view that a sentence fixed within the limits approved by Congress will not be reviewed on appeal in the absence of *extraordinary circumstances*.

United States v. Schocket, 753 F.2d 336, 341 (4th Cir. 1985) (citations omitted; emphasis added).

IX. JURY INSTRUCTION

The government introduced evidence, in connection with LaRouche's alleged conspiracy to defraud the IRS, that housing and meals were furnished to LaRouche that constituted taxable income. In that regard, the district court instructed the jury as follows:

> [T]he meals and lodging must be provided for a substantial noncompensatory purpose. Stated differently, this means that the meals and lodging cannot be provided to employees as a substitute for compensation.

LaRouche argues that the instruction was erroneous on two grounds: (1) the "substantial noncompensatory purpose" test only applies to meals, not to lodging; and (2) meals and lodging can be provided as compensation, as long as the employer otherwise meets the requirements of the Internal Revenue Code.

Section 119 of the Code provides that meals and lodging furnished to an employee may be excluded from income if they are "furnished for the convenience of the employer," and meet other requirements not relevant here. The "substantial noncompensatory purpose" test arises in the Treasury Regulations' definition of "furnished for the convenience of the employer" in the context of meals. Treas. Reg. Sec. 1.119-1(a)(2). The regulations do not explain what "for the convenience of the employer" means in the context of lodging. But there is no reason why the test would be different for meals and lodging, particularly since the same statutory text ("furnished for the convenience of the employer") controls both. The plain language of Sec. 1.119-1 of the Treasury Regulations leads to the conclusion that, in fact, the "substantial noncompensatory purpose" test animates "furnished for the convenience of the employer," and therefore applies to both meals and lodging. *See Bob Jones University v. United States*, 670 F.2d 167, 176 (Ct. Cl. 1982) (defining test for "furnished for the convenience of the employer" in context of lodging as "direct nexus between the housing furnished the employee and the business interests of employer").

Regarding LaRouche's second argument, it indeed is true that if the employer does furnish meals or lodging for

a "substantial noncompensatory purpose," the meals and lodging will be considered "furnished for the convenience of the employer," even though they are also furnished for a compensatory reason. Treas. Reg. Sec. 1.119-1(a)(2) and -1(b). However, "[if] an employer furnishes meals [and lodging] as a means of providing additional compensation to his employee (and not for a substantial noncompensatory business reason of the employer), the meals so furnished will not be regarded as furnished for the convenience of the employer." Treas. Reg. Sec. 1.119-1(a)(2).

The second sentence of the court's instruction could be interpreted in two ways. It could be interpreted to mean, as the defendants argue is erroneous, that meals and lodging can never be furnished because of a compensatory reason. Alternatively, it could be interpreted to mean that meals and lodging cannot be furnished solely as a means of providing additional compensation, as stated in the Treasury Regulations. If the challenged sentence is read alone, the defendants' out-of-context argument has merit. But read in conjunction with the preceding sentence, the court's instruction approximated the rule in the Treasury Regulations. Slight deviation, if there was any, was harmless. *See United States v. Davis*, 739 F.2d 172, 175 (4th Cir. 1984) (in light of entire charge to jury, technical error in instructions harmless).

X. DENIAL OF MOTION TO SUPPRESS NOTEBOOKS

Judge Bryan denied the defendants' motion to suppress notebooks that had been seized by the government on October 6 and 7, 1986. The defendants argue that a warrant obtained by FBI agents did not facially authorize the search and seizure of Spannaus' notebooks. Although a second search warrant did authorize the seizure, the defendants allege that an agent "exploited the information gleaned from [the initial]

illegal scrutiny to bolster his affidavit for the supplemental warrant."

Both Judge Bryan and Judge Keeton, in the Boston case, found that the second search warrant was not tainted by any illegality in the initial search. Judge Keeton reasoned that it was proper for the agents to read the notebooks in executing the first search and then to use that information in obtaining the second warrant. *United States v. The LaRouche Campaign*, No. 86-323-K (D. Mass. Oct. 5, 1987, as amended, Mar. 31, 1988) (available on LEXIS). He held that the agents had an "objectively reasonable basis" for reading the notebooks: to determine whether they fell under the scope of the first warrant. *Id.* Judge Bryan found Judge Keeton's reasoning persuasive.

The defendants fail to substantiate their contention that the agents "exploited" the information unlawfully obtained in the first search to obtain the second warrant. The district court's finding that the agents had an "objectively reasonable basis" for initially examining the notebooks is not clearly erroneous. The district court made no errors in its conclusion of law: the second search warrant was not tainted when based on information lawfully obtained in executing the first warrant.

XI. CONCLUSION

We find no infirmities in the proceedings in the district court, and, therefore, the defendants' convictions and sentences are

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 89-5518

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

LYNDON H. LAROUCHE, JR.; WILLIAM WERTZ; EDWARD SPANNAUS; MICHAEL BILLINGTON; DENNIS SMALL; PAUL GREENBERG; JOYCE RUBINSTEIN
Defendants-Appellants

WILLIAM P. ROBINSON, JR.; HANS RICHARD KLECATSKY; WOLFGANG WALDSTEIN; WILLIAM NIEBOER; KARL ALBRECHT MAJER; P.W.C. AKKERMANS; RAYMOND JAMES MEGSON; JOSEF AICKER; ALFONS ADAM; STAATSANWALT HANS-DIETER BAMLER; KARL-HEINRICH FRIAUF; RUPPRECHT GERNGROSS; HERMANN CLAUSS; FRIEDRIGH THGUNTER; HANS KLAUS HEMM; FRIEHERR VON DER HEYDTE; ARTHUR KAUFMANN; OTTO KIMMINICH; OTHMAR KELLER; EKKEHARD KAUFMANN; HEINZ NAF; ERNST F. MAYR; WILLIBALK POSCH; MARLIES NAF-HOFMANN; FRANZ SCHAD; FREIDRICH BOECKER; ANTON SPRENZEL; PETER G. STEIN; BETTHOLD SUTTER; MALTE DIEPELHORST; ALBERT BLECKMAN; MURIELLA CECE; ANTONIO MINGHELLI; PASQUALE PETROLILLO; VINCENZO SAVARESE; RUDIGER BREUER; SERGIO SABELLI; RENE MAUGIUS; EMILIO BUSSI; BURTON D. LINNE; JACK O. SLATER; JOHN C. IMLAY, IV; JEAN-MARC VARAUT; JACQUES BOILEVIN; MAITRE BIAGGI; PIERRE-LOUIS DECORPS; FREDERIC THUILLIER; KONRAD LOW; JOHN CARROLL; E.A. ALKEMA; ROBERT DUCOS-ADER;

ME MOUSSA PRINCE; JACQUES STUL; R. DAVID PEMBROKE; HELEN GINGER BERRIGAN; BERNARD J. EVERETT; JOHN A. STRAIT; JOHN L. BUSER; KENNETH J. ARONSON; JOSEPH A. BAILEY; THEO WALKER MITCHEL; JOHN O. ADAMS, JR.; THOMAS L. LORENZI; MARK T. WATSON; FRANK C. SHAW; LOUIS J. BARRACTO; TIMOTHY S. MCGARRY; R. THEODOR STRICKER; DENNIS G. BONNER; S. RUSSELL MEYER; GEORGE F. BUTT; RUTH C. FALL; YVON ROUSTAN; JOHN R. MACKAY; AUSTIN A. WEBB; VEL PHILLIPS; J. FRANK THOMPSON; RICHARD R. SANDERS; JOSEPH E. BAKER; CHARLES R. GARRY; PETER H. REA; MICHAEL NULL; DONALD W. MACPHERSON; ROBERT F. KANE; MILTON B. ALLEN; LOWELL H. BECRAFT, JR.; MATTHEW S. COLES; CHARLES F. CREWS; ANTHONY D'AMATO; BILLY M. DAVIS; MAX DEAN; EDWARD DEGRAZIA; BRUCE COMLY FRENCH; LEON GLASER; RICHARD S. GRANAT; FRED D. GRAY; ANDREW J. GROSZER, JR.; WILLIAM M. HOLLAND; GARY JAMES JOSLIN; REID W. KENNEDY; KENNETH LASSON; LINTON R. LOVETT; ROMALLUS O. MURPHY; ALVIN T. PRESTWOOD; JAMES A. SATCHER, JR.; RONALD T. SPANN; JOHN O. STAPLETON; ARTHUR P. TRANAKOS; ELDON D. WEDLOCK; WILLIAM SHEPARD MCANINCH; WILLIAM C. CAGNEY; NICHOLAS J. MIGLINO; FREDERICK L. WOECKENER; CLARICE ATTAWAY ALLEN; JOHN EIDSMOE; SANFORD LEVINSON; MICHAEL ALLEN PETERS; RANDY SCHAFFER; SCOTT RAMSEY; PETER J. RIGA; HOWARD C. RUBIN; LARRY SAUER; THOMAS J. BURKE; BRAD P. CORBETT; GERARD GUAY; HARRY R. HERTEL; DAVID W. NORD; MICHAEL P. SENG; FRANCIS P. SMITH; RUSSELL J. STEWART.; JAMES L. HINKE; STEVEN P. FRANKINO; HERBERT B. NEWBERG; BRUCE LEDEWITZ; THOMAS D. BUCKLEY, JR.; RONALD L. BRADLEY; SAMUEL T. BULL; CLARK L. DERRICK; MICHAEL L. BENDER; STEPHEN W. HAYNE; MARGRETHE R. POWERS; STEVEN E. BATES; RICHARD MICHAEL ELINSKI; VICTOR ST. MARTIN; WILLIAM S. WILLIAMS; RONALD STEVEN MINTZ; JOHN T. MOEN; JOHN R. ORTEGA; R. SAMUEL PAZ; LOIS A. PRENTICE; JACK C. STENNETT; JOHN STEWART; ROGER JON DIAMOND; MILTON

C. Grimes; Patrick Sarsfield Hallinan; Roger S. Hanson; Michael S. Hegner; Dennis Hemmerle; Ray Hendrickson; Robert M. Levy; Andrew M. Bakker; William Bence Bennett; Michael N. Berke; Claudia W. Brisson; Paul S. Choy; Dr. R. J. Chytil; John D. Matthews; Terrence Kellogg; Michael D. Kimerer; Gregory J. Bonfilio; Arnie Rolf Braafladt; Robert R. Bryan; David R. Chappel; James E. Duree; William D. Edwards; Robert P. Goldberg; Nelson W.S. Goo; David W. Hall; Gregory A. Hicks; Barry Hess; J. Stephen Salter; Phillip S. Lopez; Dick L. Madson; Frederick T. Slone; Robert Cimino; Frederic J. Dardis; Thomas G. Hippert; Bruce Feder; E. Reid Southern; Roy G. Spece, Jr.; Robert L. Storrs; Thomas A. Thinnes; John Trebon; Richard J. Trujillo; Michael D. Small; David A. Angeloff; John N. Bach; Carlos J. Badger; Howard William Bailey; Oscar Bardales, II; David J. Beavvais; George A. Boyle; Fred Canant; Curtis L. Clark; Michael Cross; Albert F. Cunningham; Deborah A. Daniel; Daniel M. Davis; Roberto De Aztlan; Melvin A. De La Motte, Jr.; Frank W. Dice; Robert Avery Dolard; David W. Dratman; Jim T. Elia; James Matthew Farley; Armando M. Flores; Gonzalo Freixes; M. Suzanne Fryer; Bruce Grinnell; Constance M. Gutowsky; Robert R. Hager; Karl H. Henry; W. G. Hesseltine; MaryLou Hillberg; Pam Spencer; Larry F. Holdrich; L. W. Holt; Steve F. Houghton; Robert L. Kennedy; Ralph R. Lopez; Jessie Morris, Jr.; Ray T. Mullen; Francine Diane Needles; Barry Nix; Joe L. Norcross; F. Vincent O'Brien; Timothy E. O'Laughlin; George W. Porter; Tim Quinn; Robert G. Scofield; Jerry Shuford; James J. Simonelli; Curtis B. Sisk; S. M. Schneider; Richard C. Solomon; Riley B. Thompson; Thomas W. Thornburg; James D. Turner; Paul Zarefsky; Daniel S. Bilderback; Joan Clifford; Robert W. Cook; Joseph C. French; George A. Johnson; Douglas McKay Kerr; Neil MacFarlane;

JEFFREY P. MATTHEWS; RALPH B. RHODES; LINDASUE SMOLLEN; PENFIELD W. TATE, II; DONALD C. SIMMONS; ANTONIO ENRIQUE ALONSO; JAMES W. KELLY; MARY JANE MATHENY; JOHN F. HOWARD; E. DAVID ROSEN; JEFFREY S. WEINER; FREDERICK S. ROBBINS; WILLIAM R. TUNKEY; ALAN S. ROSS; ROBERT G. AMSEL; DAVID RABEN; BENJAMIN S. WAXMAN; MANUEL F. GARCIA; RONALD GAINOR; BRENT EAMES; DALE GOBLE; JAY KOHLER; JIM MACDONALD; EMIL F. PIKE, JR.; MARK S. RAMMELL; RANDY J. STOKER; WILLIAM J. TWAY; LLOYD J. WALKER; DAVID R. GILMAN; BRYAN E. NELSON; WILLIAM M. RADIGAN; JAMES H. BROWN, JR.; JOSHUA J. PITRE; GERRY HANDLEY; J. MARTIN KERR; NORMAN S. ZALKIND; JOSEPH A. GOLDEN; ANTHONY J. MANSOUR; THOMAS E. SIZEMORE; WILLIAM D. SMITH; EARL D. GRAY; WENDY ALISON NORA; DOUGLAS W. THOMSON; W. S. MOORE; E. JUNE LORD; ROBERT L. STEPHENS, JR.; J. WILLIAM CALLUP; DAVID L. HERZOG; J. JOSEPH MCQUILLAN; SCOTT L. BINDRUP; RONALD F. CAULEY; RICHARD F. CORNELL; CAL J. POTTER, III; MICHAEL D'ALESSIO, JR.; FRANCIS J. MANION; WINSTONE A. MAYNARD; MERYL M. POLCARI; MICHAEL A. QUERQUES; JOEL J. REINFELD; VINCE D'ANGELO; JUDITH A. BOVA; JOSEPH M. FINE; MARY Y. C. HAN; RON KOCH; FLOYD W. LOPEZ; ROSEMARY TRAUB; MARTHA VAZQUEZ; EMILY M. BASS; ROBERT L. CLAREY; RONALD P. DE ANGELUS; HERALD PRICE FAHRINGER; WILLIAM E. CRAIN; RICHARD GREENBLATT; JAMES W. WINSLOW; KAYE LAWRENCE; PETER M. HARTNETT; MICHAEL KENNEDY; WILLIAM J. KITA; HARRY O. LEE; SUBHA NARASIMHAN; KELLIS E. PARKER; PERRY S. REICH; JOHN R. RINALDI; GEOFFREY ERIC SERWER; EDWARD M. SHAW; JOHN E. H. SHERRY; JOHN H. HARMON; THOMAS F. LOFLIN III; ROBERT G. RAYNOR, JR.; RICHARD C. ALKIRE; EDWARD G. KRAMER; THOMAS I. WEBB, SR.; MICHAEL D. ROSSI; JOHN BOHDAN GREGOROVICH; LYNNE A. DICKISON; GEORGE A. HASLETT, JR.; DUSTAN E. JOHNSON; MICHAEL J. KAVANAUGH; KENNETH A. MORROW; TIMOTHY B. O'NEILL; WILLIAM T.

PARK; JAMES H. SMITH; GEORGE W. SOHL; ROLAND J. ATKINS; BARRY T. BASERMAN; ALBERT L. BECKER; NATALE F. CARABELLO, JR.; OSCAR N. GASKINS; THOMAS M. PLACE; RONALD J. PRESSLEY; MARCUS SCHOENFELD; MAURICE L. WHITE; LEON ARISTOTLE WILLIAMS; DENNIS PAUL ZAWACKI; HAROLD C. ARCARO, JR.; WALTER R. STONE; DAVID P. RUSSELL; PHILIP P. DURAND; DOUGLAS CADDY; DAVID MITCHAM; CLYDE WILLIAMS; CLYDE W. WOODY; D. GILBERT ATHAY; DAVID M. BOWN; MICHAEL D. ESPLIN; RONALD H. GOODMAN; GREGORY BROWN HADLEY; DAVID BERT HAVAS; RAYMOND N. MALOUF; WILLIAM E. NELSON, CRANE BERGDAHL; JOSEPH A. BREIDENBACH; FRANK CALERO; CLAYTON R. DICKINSON; KIM EARL DUPUIS; WM. MICHAEL FOSHAUG; EDWARD E. GIBSON; GENE M. GRANTHAM; DAVID CARL HILL; PAUL LINDENMUTH; LAWRENCE L. LONGFELDER; WILLIAM D. MCCOOL; MARK D. MESTEL; CARL J. ORESKOVICH; MITCHELL A. RIESE; JOSEPH J. ROLLER; KATHLEEN SANDERS; EUGENE G. SCHUSTER; PAUL SINNITT; DOUGLAS D. SULKOSKY; MARVIN J. JOHNSON; BILLIE RUTH EDWARDS; DONALD E. MILLER; RONALD N. ROGERS; ELIAS EL-HAYEK; JAMES M. BARNES, JR.; JOSEPH M. MALONEY; ARLIE D. PRICE; JAMES JERRY WOOD; REX LAMONT BUTLER; JOHN NORMAN WARNOCK; YVONNE AYERS; HARRY S. BACHSTEIN; JOHN G. BALENTINE; WILLIAM B. BLASER; A. BATES BUTLER, III; LUIS CALVO; O. JOSEPH CHORNENKY; DAVID P. FLANNIGAN; ENRY J. FLORENCE; PERRY L. HICKS; OREST A. JEJNA; ALAN M. KYMAN; JOHN W. LOVELL; RONALD MCKELVEY; RICHARD K. MILLER; SUSAN M. SCHAUF; JOEL ERIK THOMPSON; CONSTANCE L. TRECARTIN; MICHAEL O. ZAVALA; ALISON MINET ADAMS; DONALD S. ALTSCHUL; THOMAS M. ANDERSON; I. SINGH AULAKH; FRED BAKER; S. R. ALASH, JR.; BEVERLY A. BARRETT; RANDAL E. BATES; ALAN BAUM; RICHARD R. BESWICK; GARY S. BLOCH; MARK L. BONAZZOLA; MARK S. BORRELL; ROBERT BUCKLEY; BLACKIE BURAK; EDWIN TRAIN CALDWELL; GUY A. CAMPISANO, JR.; JAMES P. CARROLL; BRUCE CORMICLE; CHRIS CASCIOLA;

James V. Castelli; Christopher Chaney; Bob Clark, Jr.; James Michael Coady; Gerald M. Cobb; Paul W. Comiskey; James P. Cooper, III; John J. Lee; David B. Davis; Grady M. Davis; Jeane Dekelver; Donald P. Dorfman; John Doyle; Raymond V. Dunn; David A. Elden; George C. Eskin; Richard L. Ferguson; Thomas J. Ferrito; R. Bruch Finch; Robert Friedman; Richard A. Frishman; Reg Fudge, Jr.; Marc B. Geller; James M. Glick; J. Mike Gunn; Gayle A. Gutekunst; Andrew J. Haynal; Donald H. Heller; Miguel Hernandez; Gregory P. Humphries; Ronald A. Jackson; Donald W. Jordan; Joseph M. Kadans; Kenneth Kahn; Nancy Ann Kramer; Stephen B. Krimel; Joseph F. Landreth; Steele Lanphier; Timothy Lemucchi; Leonard B. Levine; Nick Lymberis; William C. Maestas; Donald M. Martell; Luis Martinez; Michael J. McCabe; Michael D. McGlinn; Dennis G. Merenbach; Dean J. Miller; Jon C. Minsloff; Norma Mitchell; Richard Jay Moller; Larry Montgomery; Maurice Moyal; Nancy Meyers; Manuel E. Nestle; Barry K. Newman; Eric R. Ortner; Michael Pancer; Montana Podva; James F. Pokorny; Frank J. Ragen; Henry M. Ramirez; Donald Re; Ronald A. Reed; Harry M. Reynolds; Dennis Roberts; Jan Edward Ronis; Benjamin Sanchez, Jr.; Christopher J. Schatz; J. Barry Schiavo; Julie Schumer; Sheldon Sherman; Gerald E. Singer; Esther R. Sorkin; Nolan C. Stringfield; Dennis C. Strong; Raymond J. Thielen, II; Howard M. Van Elgort; J. Roland Wagner; Deborah A. Vollmer; Glenn Warren; Robert J. Waters; James Wm. Webster; Thomas J. White; James E. Wilkoski; Dale E. Wood; Gilbert Zavala; John D. Aylward; Darol C. Biddle; Patrick W. Buckingham; Christine A. Carney; Napoleon S. Crews, Jr.; James M. Croshal; Michael R. Enwall; Leonard I. Frieling; Larry Galka; John P. Ascoyne; Richard E. Gram; Peter G. Hanigan, Jr.; Dennis W. Hartley; John T. Hyland; Randall D. Jorgensen; Deborah L. Kalb;

RICHARD C. LAFOND; JAN A. LARSEN; THOMAS H. MAY; RUSSELL OLIN; JOE PICKARD; JOHN GUINN RAMSAY; FRANK S. SIMONS; JOSEPH TOCK; ROBERT B. WARREN; RICHARD R. BROWN; ROBERT M. CASALE; S. V. FAULISE; WILLIAM T. GERACE; JAMES C. BANKS; JOSE R.E. BATISTA; ROBERT O. BAUER, JR.; JAMES D. BEACH; GARDNER W. BECKETT, JR.; ROBERT F. BETHEA; DONALD E. BROWN; MICHAEL B. BROWN; RENDELL BROWN; HARREL T. BUGGS; MICHAEL W. BURNBAUM; THOMAS H. BUSCAGLIA; DAVID J. BUSCH; LOUIS G. CARRES; ARTHUR W. CARTER, JR.; MICHAEL B. CHAVIES; ERIC M. COHEN; PETER CUSHING; REEMBERTO DIAZ; ROBERT H. DILLINGER; HERBERT W. ELLIS; KIERAN P. FALLON; LEE FUGATE; LOUIS GIOVACHINO; JUAN DE JESUS GONZALEZ; LYON J. GREENBLATT; ROBERT V. GREENE; MELVYN G. GREENSPAHN; BARRY S. GREFF; MICHAEL K. GROGAN; NORMAN FRANCIS HAFT; MARIA RIVAS HAMAR; RICHARD A. HAMAR; ROBERT AUGUSTUS HARPER; SUSAN W. HARRELL; R. H. BO HITCHCOCK; GERALD MICHAEL CUNNINGHAM; DENNIS G. KAINEN; TERRENCE E. KEHOE; R. SCOTT LAING; KEITH C. LEVARITY; NEAL RANDOLPH LEWIS; IRWIN G. LICHTER; ROBERT J. LINK; MICHAEL R.N. MCDONNELL; CARLA MILLER; HOWARD W. SKINNER; DONALD S. MODESITT HILLIARD MOLDOF; JAMES W. O'NEILL; GEORGE T. PALLAS; WALTER REYNOSO; HUBERT G. ROBERTS; ROBERT ROSENBLATT; SCOT E. SAMIS; MICHAEL S. SCHLESINGER; HORACE SMITH, JR.; DWIGHT CHAMBERLIN; SKY E. SMITH; MARK ELLIS SOLOMON; JOEL A. SPECTOR; STUART L. STEIN; MICHAEL H. TARKOFF; MICHAEL A. VOIGHT; JEFFREY D. WEINKLE; JOSEPH CHARLES WHITELOCK; PATRICIA G. WILLIAMS; BARRY B. WITLIN; STEWART A. ANSHELL; GWENDOLYN A. ATKINSON; BOBBY LEE COOK; EARL A. DAVIDSON; MONROE J. FELDMAN; J. E. JARVIS; ROBERT L. LITTLEFIELD; BILLY MATHIS; DENNIS R. SCHEIB; WILLIAM M. SHINGLER, SR.; STEVE H. CEDILLOS; BROOK HART; HOLLIS J. ANDERSON; STEVE F. BELL; ROBERT L. BROWER; R. ROMER BROWN; GEORGE D. CONTRAD; CHARLES M. DODSON; JAMES A.

RAEON; DAVID R. DUCHARME; FRED W. GABOURIE, JR.; MICHAEL HENEGEN; EVERETT D. HOFMEISTER; MARK A. JACKSON JAMES T. KNUDSON; CHARLES B. LEMPESIS; PAUL R. KROEGER; HOWARD I. MANWEILER; MICHAEL B. MCFARLAND; GARY H. PIGMAN; DANIEL L. SPICKLER; MICHAEL J. VRABLE; WILLIAM L. PARKS; ELLIOT R. ZINGER; DENNIS M. ZITZER; TIMOTHY J. AREHART; EDWARD W. DOSH; HENRY A. GOERTZ; CAMILLA KLEIN HAVILAND; R. BRUCE KIPS; EDWARD. M. VAN MORLAN; PETER JOHN ORSI; JAMES S. PHILLIPS, JR.; DOUGLAS E. WELLS; MICHAEL S. FAWER; DENISE LEBOEUF; JACK C. FRUGE', JR.; CAMILLE F. GRAVEL, JR.; EDWARD LARVADAIN, JR.; THOMAS K. REGAN; ANDREW S. VALLION; RALPH S. WHALEN, JR.; ROBERT M. WASHBURN; CARMINE L. GENTILE; JOAN LIEBERMAN; FREDERICK C. MYCOCK; CHARLES M. MACLEAN; MICHAEL J. SPLAINE; ROBERT L. WARD; JAROSLAW DOBROWOLSKYJ; GEORGE R. DARRAH; THOMAS R. EVERETT; DOUGLAS HAMEL; LOLANDA R. JOHNSON; SCOTT A. KEILLOR; JOHN R. MANN, III; THOMAS M. MCGINNIS; CHRISTOPHER E. MENGEL; GREGORY L. TOLER; THOMAS V. WILHELM; AUSTIN F. SHUTE; F. A. WHITE, JR.; SAMUEL COON; GREGORY A. JACKSON; MATTHEW H. O'NEILL; MICHAEL J. SHERWOOD; JOHN F. AMAN; JOHN STEVENS BERRY; GARY M. BODNAR; ROBERT WM. CHAPIIN, JR.; MICHAEL F. GUTOWSKI; JEANELLE KLEVELAND; RICHARD DOUGLAS MCCLAIN; WILLIAM C. STANEK; JEROME M. POLAHA; EDMOND R. CASEY; WILLIAM J. DE MARCO; STEVEN M. GILSON; HENRY J. NIX; BARRY N. SHAW; RAYMOND J. ZELTNER; JAMES L. BRANDENBURG; MARK A. FILOSA; LAWRENCE M. PICKETT; JAMES E. TEMPLEMAN; JACK T. WHORTON; MARK LEMLE AMSTERDAM; SIDNEY BAUMGARTEN; HAROLD BORG; SIDNEY H. DWORET; ROBERT C. FOGELNEST; LAWRENCE HOCHHEISER; LEON A. MILMAN; JAMES L. BLOMELEY, JR.; H. CRAIG FARVER; C. WAYNE HEASLEY; KEVIN G. MCLAIN; MICHAEL A. SHEELY; KAREN M. ZAMAN; MARK N. HARDIG; E. SCOTT SHAW; KARIN JOHNSON CHATFIELD; BRIAN M. DELL; WILLIAM H.

HINKLE; L. STEPHEN JONES; JOHN W. TEETER, JR.; DONALD K. ARMSTRONG; ROBERT W. CONNELL; LEEROY O. EHLERS; DANIEL W. GOFF; TERRANCE P. GOUGH; JOHN HALPERN, JR.; DEAN HEILING; DAVID A. HILL; STEVEN J. JOSEPH; JOHN S. MARANDAS; ROBERT J. MCCREA SHAUN S. MCCREA; MICHAEL MCGRADY; NANCY NICKEL; A. J. SCHMEITS; JAMES J. SUSEE; MARC SUSSMAN; TERRI WOOD; JAMES D. CRAWFORD; ANDREW G. GAY; BERNARD MCINTYRE; RICHARD VIETH; THOMAS R. BANDY, III; JAMES V. BARR, III; JAMES O. MARTY; STEVEN OBERMAN; RAYMOND G. PRINCE; RAYMOND A. SHIRLEY, JR.; DOUGLAS A. TRANT; C. R. KIT BRAMBLETT; CHARLES CAMPION; VERNON L. DECKER; DONALD R. MCDERMITT; JACKSON HOWARD.; DANIEL W. MARCUM; DENVER C. SNUFFER, JR.; MICHAEL D. AIKEN; GARY H. BENJAMIN; DAVID M. BOHR; PHILIP L. BURTON; JOHN R. CLARK; KENNETH J. EVANS; RICHARD C. FITTERER; STEPHEN L. FREEBORN; JOHN GALBRAITH; GLENDA HULTMAN GEERLOFS; FRED D. GENTRY; MARY E. GENTRY; LEE A. HOLLEY; GARY T. JONES; STEVEN C. LACY; DEBORAH MARANVILIE; J. BRADLEY MEAGHER; RICHARD MONTOYA; JOHN R. MUENSTER; GREGORY NELSON; GREGORY P. NORBUT; LINDA J. NYE; HOWARD E. RICHMOND, JR.; STEWART P. RILEY; RICHARD L. SETTLE; STEPHEN C. SCHUTT; STEPHEN R. SKELTON; JOHN F. STROHMAIER; JAMES A. TRUJILLO; ELIAS S. TSIPRAS; DAVID A. WELTS; SID WURZBURG; MARK L. YELISH; DAVID P. BAUGH; ROBERT A. BLOUNT; CLAIRE G. CARDWELL; CALVIN R. DEPEW, JR.; OLDRIC J. LABELL, JR.; CONRAD C. LEWANE; JAMES A. SEGALL; THOMAS PAUL KRUKOWSKI; DAVID LOEFFLER; JEFF SCOTT OLSON; CAROLINE FRIBANCE; RICHARD GRAYLOWV; W. KEITH GOODY; LENNART HANE; ROBERT WATSON; GEORGIA IREY; GEORGE EDDLESTON; JOHN PERRICONE; THE FOUNDATION AGAINST ABUSIVE, CORRUPT AND TYRANNICAL SYSTEMS, a public interest law firm

Amici Curiae

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan with the concurrence of Judge Hall and Judge Butzner.

For the Court,

John M. Greacen
CLERK

APPENDIX C

Alexandria Division

X — — — — — — — — — — — — — — — X

UNITED STATES OF AMERICA	:	
-vs-	:	CRIMINAL ACTION
	:	NO. 88-243-A
LYNDON LaROUCHE, et al.,	:	
Defendants.	:	

X — — — — — — — — — — — — — — — X

Friday, November 4, 1988
Alexandria, Virginia

Transcript of motions proceedings in the above-
BEFORE:
United States District Court

APPEARANCES:

FOR THE UNITED STATES:
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Assistant U. S. Attorney
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FOR THE DEFENDANTS:
R. KENLY WEBSTER, ESQUIRE
Of: SHAW, PITTMAN, POTTS & TROWBRIDGE
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* * * *

MR. WEBSTER: Your Honor, I have one additional matter I would like to inform the Court of at this point. I appear a little thinner and more haggard than I did when I first was moved for admission into this matter two weeks ago. During that time I have strived constantly to get an assessment of this case, make a determination of what it's going to take to prepare. We have, as Your Honor knows, filed three motions and one uncontested motion, the uncontested motion being to organize a defense in such a way as it could react as a team. But it is my firm view that I cannot be ready for trial on November 21. I would like to inform the Court that I would be filing today in the middle of the day a motion for adjournment of the trial date from November 21 and concomitant relief from the deadline for filing additional motions which are under consideration and in preparation, that due date being Monday. I will file those papers midday.

We would be pleased to be heard by the Court as soon thereafter as practicable.

THE COURT: They will be heard next Thursday with the other motions.

MR. WEBSTER: Or alternatively if Your Honor wishes, I could argue it orally here at this time.

The problem that we are having among other things is, Your Honor, we have seven defense counsel as you know for each of the defendants. We have two defense counsel from Boston. We have a case in which there are a warehouse literally —

THE COURT: Are you arguing your motion for continuance now or not? I don't want to hear this twice.

MR. WEBSTER: I am saying, Your Honor, that we are under a deadline Monday to file all motions. And we have filed three or four now serious motions as fast as we could get them to the Court. We have another ten or twelve under consideration, and partially in preparation. We may be able to shrink those. But I just don't see us meeting the deadline of Monday for all that material.

I have been in the case two weeks, Your Honor. This is a matter that the Government has been investigating since 1984 or this Grand Jury here in this area for upwards of two or three years. We are being pushed into a double case, a tax case now superimposed on top of this. My client's an unindicted co-conspirator —

THE COURT:. (Interposing) Are you arguing your motion for continuance now or are you just telling the Court you are going to file them because I am going to hear the same thing from you again and I don't want to hear it twice.

MR. WEBSTER: I respect that, Your Honor. I am in a bind. If we file the papers today and hear it on Thursday, then I am stuck with a deadline to file motions that expires on Monday before I get heard on this matter. I really am up against it.

So I would be pleased to make the motion orally and have it heard now if that meets the convenience of the Court.

THE COURT: All right. You can do it right now.

MR. WEBSTER: Your Honor, I have laid the background here. With respect to counsel, it is true that there are two counsel from Boston with whom we have coordination, makes it more difficult to coordinate. We have a warehouse full of

documents down in Springfield; Virginia, which I will address in a moment.

We also have some counsel in this case who are participating in the Boston case. Mr. Robinson and the Government always makes the point that we know a great deal about the matter because we know about Boston, but I don't. I have not been involved in the Boston case; and I have been involved in this case formally for two weeks.

As I indicated, the Government's preparation has been really extensive over a protracted number of years. The documents in this case, Your Honor, are absolutely staggering. There are over 400, over 400 cases of documents in the warehouse in Virginia. The Government may take the position that they are not relevant. I don't know that. They are looking at the case from the standpoint of the prosecution. I have to look at it from the standpoint of the defense.

The Government has identified some five, six, seven, I am not sure what the number has grown to now, documents which they are turning over in connection with Rule 16. That process is still ongoing, Your Honor; it's been as recently as the day before yesterday, another batch of material was provided so that we sent it to the copier yesterday.

There is going to be an extensive amount of Jencks material in this case at some point to examine. I have, Your Honor, which I can submit to the Court an affidavit of one of the counsel in this case, Mr. Williams, which I would submit to the Court is very short. This is Mr. Williams' review, Your Honor, of material that has not previously been made available to any defense counsel in the case. You will see there are three segments of that material; each of those segments involve a file cabinet which I think is three drawers, another batch which is three drawers, and a third batch, which is

three boxes. He is estimating that an assessment time to go over that material as counsel would be seven to ten days. We wouldn't even at that time be able to assess exactly how to use it, whether we want to use it or not. This is material we have never seen before, and that is just—we still haven't examined it. We have just had access to it at the warehouse. We have had access to it this week.

I have tried, Your Honor, as have other defense counsel, to put together a machinery of organization and coordination. I think Your Honor can appreciate that those are additional problems superimposed on the difficulties of preparing a case like this. Your Honor's ruling this morning makes it even more difficult for us, because we now have to prepare two cases instead of one. We could have carved out at least the tax aspects of the case and shrunk it some.

Your Honor, I just cannot, without a better grasp of the documents and the written material, I cannot make the assessment necessary on the filing of various motions that are due on Monday, and I ask for relief in this case to put the trial off to a date of mid-January, January 18th, and give us a reasonable eight weeks to examine these hundreds and hundreds of boxes and cartons, make the assessments, streamline and coordinate the case as best we can.

I would also ask in that regard that the deadline of course for the filing of motions be postponed to an appropriate point, perhaps in mid-December, which would give us a month or six weeks or so to make an assessment of this horrendous amount of material.

MR. ANDERSON: Your Honor, Mr. Webster spoke as counsel I think was probably least familiar with the case when he came into it or one of those who was least familiar with the circumstances. I speak as one of those who is probably

most familiar with the circumstances so to speak, and I have been quite overwhelmed over the past two weeks in the preparation required for this case.

My offices are in Boston. I have spent two days in my office in Boston since then in an effort to wrap up business because of the rapid approach of the trial date, and I had hoped to grab one more to finally resolve a few remaining things I have before I come here essentially fulltime.

We have spent since the arraignment in excess of 20 hours in joint defense meetings, as well as in smaller groups in terms of breaking down working assignments, in designating areas for preparation so that not everyone has—so we don't duplicate each other's efforts and rather complement each other's efforts in an effort to get as much done as we could in a short period of time.

I recognize, Your Honor, that there is a history and tradition in this Court in particular in terms of moving cases along. I want to mention what this is is a good-faith request for more time, Your Honor. It is not in any way an effort to derail the proceedings or create a problem with the Boston trial date. As I said, we all know whether it's mentioned or not, that there is a trial date of January 3rd in Boston. In fact, that trial date, there is a conference, I have to be in Boston for a conference on the case next week; I don't think that any of the parties to that case including Judge Keaton, given the circumstances of this case here, have any expectation at this point in time that anything is going to happen on January 3rd except that it will precede January 4th.

Certainly, the Government, the attorneys in that case are in fact have been announced by Mr. Robinson to be assisting him and to assist him during the course of the trial here. So this isn't—I think it's important to make this clear

and on the record that this is not an effort to in any way get the Boston case started so as to affect a transfer that was not granted by the Court earlier.

This is an honest and sincere presentation of the fact, Your Honor, that the complexity of this case, the volume of documents, the difficulties of crafting appropriate discovery requests and supporting those with arguments that are clear and all of the rest of the preparation, including travel around the country to interview witnesses, and they are around the country, if you will look just among the victims that are alleged let alone those who are not mentioned by name. There are no two that are in the same State. It goes from California, West coast to East coast —

THE COURT: Can there really be any surprises, though, from at least your point of view—you are in a little different position than Mr. Webster—in this case?

MR. ANDERSON: Well, the surprises—I am constantly surprised, Your Honor, by the twists and turns. I am not surprised by the general allegation made in the pleadings. Of course, I am surprised totally by the specifics alleged. I have had no opportunity to talk to any of those individuals. What we are really asking for, Your Honor, is a reasonable extention of time to prepare our motions and a reasonable extension of time to prepare for trial. I would suggest, Your Honor—I certainly am not asking that in any way that the furthest extension granted by Your Honor in terms of a trial date, just to be on the absolute certain safe side not go beyond January 3rd so as to avoid any possibility of any disruption of this Court's docket with the Boston schedule. I would say that the absolute latest date that I would be asking for would be January 2nd, which is obviously the day before. It's a trial date. It's a Monday, I believe. I don't have my calendar. I might be wrong in that regard, but the point is I am not

asking and I don't think any of us are asking to fool around with the docket and alter things because of the pending Boston case.

We are simply asking, Your Honor, on behalf of ourselves and our clients for an opportunity to adequately and even for me, who has been involved in the Boston case and has a better basis of knowledge of the organization and the individuals involved, the allegations generally that the Government makes, require additional time. I have been under—I haven't got my work done. Thank you, Your Honor.

MR. WEBSTER: Your Honor, I just forgot to mention one other ingredient that I would like you to consider in connection with this motion, but we do have—two others—one, we do have tapes here which are tape recordings that the Government has made between individuals acting on behalf of the entities and people who are being solicited. The number of consented, as the Government calls them, conversations I think is 25. The number of tapes stretches out to 50. There are literally hundreds of hours involved here, which is another burden. There are also additional tapes listed which is being made available by the Government. And maybe this material is material that others have had access to, but it is not material that I have seen in my preparation. We will have videotapes. We will have other oral tapes. I didn't comment on the number of witnesses, but, Your Honor, there are a dozen or so unindicted co-conspirators mentioned. There are a dozen victims mentioned.

The Government has indicated that it may ask for an additional number of people, perhaps half-a-dozen in connection with allegations of victims in furtherance of the alleged conspiracy on the fraud count. We also have, and the other day at one meeting alone we received eight subpoenaes from the Government for testimony from individuals from the orga-

nization. I don't know how many more there are there. There are seven defendants to be considered. The testimony of the Government witnesses could be extraordinarily large.

To prepare all this, Your Honor, is just an impossible task coming into a case as recently as two weeks ago.

Mr. Williams, who is not here, came into the case after I did. So he has had very little opportunity to prepare, and some of the others, of course, came in on the day of the arraignment.

I think that, Your Honor, the question of Judge Keaton could be worked out even within the date here that we have requested, which would be in my view a fair date on the tightest of compressed schedules in such a gargantuan case such as this. I would suggest that there would be methods to work that out in the event that Your Honor looks favorably upon this request.

I would also like the opportunity to complete and submit the papers that we have in mind to the Court in connection with this motion.

MR. ROBINSON: Your Honor, by way of response, I am not surprised that this motion came up. I had been collecting documentation which I was goinq to prepare to the Court had it been made in writing. Since I am forced to do that orally, I will have to do it in generalities.

The essential thrust of this motion is that the material in the Government's possession is so vast that it cannot be comprehended by the defense in the time provided by the Court. I would like to make a few observations.

Mr. LaRouche and Mr. Spannaus and Mr. Billington, of course, are defendants in the Boston prosecution. All of the material save the materials which I gather will be referred to in Mr. Williams' affidavit, although I haven't seen that affidavit, all of the rest of those materials have been continuously available to those three individuals as Rule XVI materials throughout the pendency of the Boston indictment. That ranges anywhere from 18 months to 2 years to those individuals.

In addition, of course, Mr. Billington is a defendant in a State Court prosecution and much of the material has been available to him in that context as well.

Mr. Webster is the only attorney who is part of the defense team who has not been involved in either the Boston prosecution or the Loudoun County prosecution, Your Honor. So the period of time in which these various attorneys have had access to the material also has been lengthy, in many cases extending up to as much as 2 years.

As a consequence of the various discovery activities which have gone on in those two prosecutions, a substantial portion of the materials in the Government's possession has been copied over the last 2 years. I don't have the documentation in front of me. I suspect it is at least half, at least half. During one period of the Loudoun County prosecution the State was attempting to copy everything that had been seized under the State warrant that was executed simultaneously with the Federal warrant. An enormous quantity of material was produced in copies to the joint defense effort and to many of the defendant's attorneys who are present in the Court here today. Similarly, out of the Boston prosecution, many boxes of material were produced to the defendants which they copied during the course of that ongoing litigation over the course of the past 2 years.

The same is true of many, although not all, of the various audio tapes that have recently been produced to the defendant. Many of them were produced and copies as long ago as last January and made available to the joint defense effort at that point.

So I don't think we are in a situation where the defendants have to come to grips with 400 boxes of documents in a few short weeks. On the contrary, the joint defense effort which has been identified in the pleadings, particularly the pleadings related to Mr. Gettings' disqualification have had access to those documents over the course of a substantial number of months. I just don't think they are in a position of such disadvantage as they make out.

As to the materials that are set forth in Mr. Williams' affidavit, he anticipates a time of seven to 10 days necessary to look through them. Your Honor, I have gone through all of those documents since the time of arraignment. I went through them for the purpose of selecting out the documents I wanted to use in the the trial. It took me less than a day to go through all of those documents. I think among seven defense attorneys they could certainly accomplish the same task in less than seven to 10 days. Those are the only materials that haven't been available for a substantial period of time. And they all have been available in essence since the time of arraignment. Thank you, Your Honor.

MR. WEBSTER: If I had been working on this case for 2 years I would know what I was looking for and what it meant. I haven't. The chain is no stronger than its weakest link, Your Honor. I cannot be prepared on November 21.

MR. ANDERSON: Two sentences, Your Honor. My understanding that in the over 400 cartons which filled two trucks

where were seized on August 6 and 7, 1986, that there are over 2 million documents. For Mr. Robinson to suggest that those 2 million documents, because they have been in the warehouse and theoretically I could have walked into that warehouse at any time in the course of preparation for the Boston case, looked at each one of those documents, is ridiculous.

I obtained and reviewed those documents provided by the Government and those that we were otherwise able to determine were relevant to the specific allegations of the Boston case, those amounted to thousands of pages. They are not the same thousands of pages that are relevant to this case, because of the difference in specifics.

I say thousands. That could be more than just thousands, it could be tens of thousands, for all I know.

THE COURT: It is a long two sentences, Mr. Anderson.

MR. ANDERSON: That is a lot of commas.

THE COURT: The motion for continuance will be denied. Most of these defendants and most of these counsel have been involved in this case long before this indictment came down. Mr. Spannaus, Mr. Webster's client, is himself a lawyer. I cannot — it may mean some extra work, and I don't doubt that it does. It may be to some extent a hardship. I do not think it warrants a continuance of the case, however, and the motion for continuance is denied.

MR. WEBSTER: I would like to correct one thing, Your Honor. My client is not an attorney at law and not a member of any Bar.

THE COURT: Then I am mistaken in that. But he has been involved in it, and other counsel for him have been involved in it for some time.

(Whereupon, the proceedings in the above-captioned matter were concluded.)

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,	)	
	)	
V.	)	
	)	CR. NO. 88-00243-A
LYNDON H. LAROUCHE, JR.,	)	
et al.	)	
	)	

RENEWED MOTION FOR CONTINUANCE OF TRIAL DATE

The defendants, Lyndon H. LaRouche, Jr., et al., by under-signed counsel, respectfully renew their Motion for A Continuance of the trial date in this case, currently set for November 21, 1988. Defendants respectfully request that the trial date be continued to January 18, 1989, or a date thereafter. The grounds for this motion are that the size and complexity of this case have made it impossible for counsel for defendants to adequately prepare for trial in the only 38 days between arraignment and the current trial date. For a further elaboration of these grounds, this Court is respectfully referred to the attached Emergency Pe-tition of Edward Spannaus for Mandamus and Request for Expedited Consideration (Exh. A) and the Supplemental Filing with Respect to Edward Spannaus for Mandamus and Request for Expedited Consideration (Exh. B).

Dated: November 16, 1988

Respectfully submitted
For All Counsel,

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APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

In Re: EDWARD SPANNAUS, *Petitioner*	)	No.

EMERGENCY PETITION OF EDWARD SPANNAUS FOR MANDAMUS AND REQUEST FOR EXPEDITED CONSIDERATION

The Petitioner in this case, Edward Spannaus, a defendant in United States v. Lyndon H. LaRouche, Jr., et al., Cr. No. 88-00243-A (Eastern District of Virginia, Alexandria Division), on his own behalf and on behalf of his six co-defendants[1] seeks extraordinary relief from this Court[2] from Chief Judge Albert Bryan's Order denying them a continuance of the trial date currently set for November 21, 1988. Petitioner seeks this extraordinary relief because of the extraordinary circumstances in which he and his co-defendants have been placed: forced to go to trial only 38 days after being charged in a complicated, 13 count, 52-page, indictment, which had been, in turn, investigated and developed by the Government for the past four and one-half years. The Indict-

[1] Counsel for each co-defendant, Lyndon H. LaRouche, Jr., William Wertz, Michael Billington, Dennis Small, Paul Greenberg, and Joyce Rubinstein, have all authorized undersigned counsel for Edward Spannaus to make this Petition on their behalf.

[2] This petition is brought pursuant to Federal Rules of Appellate Procedure 21 and 27, Local Rule 21, and Internal Operating Procedures 12.4 and 21.1.

ment charges two separate and distinct cases, a loan fraud scheme and a separate tax fraud case, involving over two million relevant documents, numerous audio and video tapes and numerous witnesses scattered across the United States.

Given the sheer volume of this case, the complexity of the schemes charged therein, and the tremendous time constraints imposed by Judge Bryan, counsel for Petitioner and his co-defendants will simply not be ready to adequately and effectively represent their clients on November 21, 1988. And no justification of any kind has been offered for placing defense counsel in this position. The record discloses no harm to the Government that is avoided, or interest of the Government that is advanced, by this rush to trial. Moreover, the record suggests no injury that would be visited upon anyone if the relief sought by this Petition is granted.

Due to the imminent trial date, expeditious consideration of this Petition is essential.

STATEMENT OF FACTS

On October 14, 1988, after a two-year grand jury investigation in the Eastern District of Virginia—an investigation that was part of a larger, nationally-coordinated effort by the Department of Justice initiated in Boston, Massachusetts over four years ago—petitioner Edward Spannaus, along with Lyndon H. LaRouche, Jr. and five others, was indicted in a 13 count indictment charging two distinct cases. The first part of the Indictment charges a loan fraud scheme in which all defendants are charged with conspiracy and 11 substantive counts of mail fraud arising out of an alleged scheme to obtain loans from political contributors without any intent to repay those loans. The second part of the Indictment asserts a *Klein*-type tax conspiracy count, charging LaRouche alone, along with unidentified and unindicted co-conspirators, with de-

frauding the Internal Revenue Service with respect to his personal income tax obligations. *See* Indictment (App. A).[3]

The Government chose to return the present indictment on October 14, 1988 in the middle of Mr. LaRouche's presidential campaign,[4] for one reason and one reason only: To ensure that a trial in the Eastern District of Virginia on those charges would precede an older and significantly related retrial of a federal indictment against LaRouche, Spannaus, Billington, and 16 other LaRouche supporters, which had long been set for trial on January 3, 1989 in Boston before the Honorable Robert Keeton. *See* Motion of Defendants Lyndon LaRouche, *et al.*, for Transfer to the United States District Court for the District of Massachusetts Pursuant to Rule 21(b) ("Transfer Motion"), at pp. 2-13, (App. B). The Boston indictment, which, among other offenses, also charged loan fraud, had been returned on June 30, 1987[5] resulting in a seven-month jury trial before Judge Keeton declared a mistrial on May 4, 1988 due to juror hardship. In addition, Judge Keeton found systemic and institutional government misconduct. Significantly, the press reported that jurors had been prepared to acquit all defendants on all counts based on the evidence which they had heard up to the point of mistrial. *Id.* at 9 (App. B).

In an effort to avoid having to retry the Boston case, the Government returned its Alexandria indictment on Friday, October 14, 1988. Knowing that a trial date would be set at arraignment, the Government insisted upon having arraignment on the next working day, Monday, October 17, 1988.

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[3] "App." denotes the Appendix.

[4] Mr. LaRouche is on the ballot in twelve states and the District of Columbia.

[5] The indictment on which the defendants in Boston went to trial was actually the Government's second superseding indictment in that case. *Id.* at 6 (App. B).

The Government expressed concern that with each passing day there was an increased possibility that trial would be set in Alexandria after January 3, 1989, thereby permitting the Boston case to be retried before the Alexandria case could proceed to trial.

In conformance with the Government's timetable, arraignment occurred before Judge Bryan on October 17, 1988. Due to this accelerated pace, two of the co-defendants, including Petitioner Spannaus, were unable to obtain counsel and were unrepresented at arraignment. Judge Bryan further accommodated the Government by calendaring the case for trial on November 21, 1988, a mere 36 days from arraignment. Moreover, Judge Bryan ordered that all motions be filed November 7, 1988 and that oral argument on those motions be heard on November 10, 1988. Even the Government was taken aback by having only two days in which to respond to defense motions before argument, but Judge Bryan, prejudging the merits of the defense motions, suggested to the Government that whatever motions were filed could be easily answered:

> MR. ROBINSON: Your honor, just looking at my calendar, I think that gives me —
>
> THE COURT: It doesn't give you much time.
>
> MR. ROBINSON: About three days on the motions.
>
> THE COURT: Mr. Robinson, 90 percent of these motions are going to come out of the word processor.
>
> MR. ROBINSON: That is true, Your Honor.
>
> THE COURT: You have seen them before, and I have seen them before. There will be two or three or four ones that warrant some serious thought, and the rest of them I can recite by heart. Counsel know that.

Transcript of Arraignment, at p. 8 (App. I)

On October 19, 1988, Petitioner, acting *pro se*, along with his co-defendants, filed a motion to transfer the case to Boston, arguing that an overlapping prosecution was set for retrial on January 3, 1989. On October 20, 1988, the Government responded to defendants' motion, contending that the two cases were in fact "quite distinct, as to defendants, charges, and the nature of the underlying schemes." Government's Response to Defendant's Motion to Transfer Venue ("Government's Response to Transfer"), at p. 1 (App. C). Argument on the transfer motion occurred on the following day, October 21, 1988, at which time undersigned counsel entered his appearance for Petitioner Spannaus. At the conclusion of argument, Judge Bryan denied the motion to transfer, finding that there were fundamental differences between the Boston and Alexandria indictments.

On November 2, 1988, counsel for Petitioner, along with all co-defendants, filed a motion with Judge Bryan, seeking relief from misjoinder under Rules 8(a), 8(b) and 14 of the Federal Rules of Criminal Procedure, on the ground that the personal in come tax count against Mr. LaRouche had been improperly joined with the 12 loan fraud counts of the indictment and would result in prejudicial spill over between the two unrelated charges. Defendant LaRouche's Motion for Relief from Misjoinder of Counts (App. J). On November 4, 1988, after hearing oral argument, Judge Bryan denied that motion as well. Court Orders (App. H).

In denying the severance motion, the court placed defense counsel in the position of having to go to trial within 17 days on both the loan fraud and tax fraud charges. However, after two weeks of concentrated preparation by all co-counsel for this trial, counsel for Petitioner and his co-counsel concluded that they simply would be unable to be ready to competently and properly represent their clients by Novem-

ber 21, 1988. Indeed, during that two-week period it became obvious to all co-counsel that the massive amount of factual and legal work which needed to be done to prepare defenses to these charges could not be accomplished in the time remaining before trial.

Accordingly, on November 4, 1988, Petitioner and his co-defendants orally asked Judge Bryan for a continuance of the trial date for 60 days. Transcript of Motions Proceedings, at pp. 28-29 (App. D). In making their request, counsel reminded Judge Bryan of the complexities involved in this nationwide investigation and prosecution; and of the fact that the Government had studied hundreds of thousands of documents, and subpoenaed large numbers of witnesses before grand juries in Alexandria and Boston in order to fashion a complex, wide-ranging indictment; and of the fact that the indictment was not returned until the Government was absolutely ready to go to trial. Moreover, the indictment was carefully drafted to charge two separate and distinct conspiracies involving two separate substantive areas (loan fraud and tax fraud), plus eleven mail fraud counts, and yet be "quite distinct" in all essential particulars from the case in Boston. Indeed, in responding to defendants' transfer motion, the Government and Judge Bryan described the Alexandria indictment as distinct and separate from the Boston charges. *See* Government's Response to Transfer, at pp. 1-4 (App. C).

In explaining to Judge Bryan that November 21 was an impossible deadline to meet, counsel for Petitioner specifically reviewed the massive evidentiary and legal undertaking which was necessary to be properly prepared for trial:

- Extracting relevant evidence from over four hundred cartons holding over two million documents stored by the Government in a warehouse in Springfield, Virginia.

- Analyzing approximately fifteen hundred pages of *Jencks* materials still to be made available by the Government.
- Reviewing and analyzing approximately eight boxes of Rule 16 documents provided by the Government.
- Reviewing and analyzing over 50 audiotapes recording 25 telephone conversations of many hours.
- Reviewing and analyzing approximately 20 additional audiotapes.
- Reviewing and analyzing approximately six video tapes.
- Reviewing and analyzing approximately nine file drawers of documents first made available to defense counsel during the week of October 24.[6]
- Interviewing numerous alleged victims of the loan fraud described in the indictment and scattered throughout the United States, including witnesses in Iowa, Washington, Texas, Florida, Connecticut, New York, Indiana, California, and North Carolina.
- Finding the identities of, and interviewing, additional government loan fraud victims also expected to be scattered throughout the country.
- Evaluating and analyzing the significance of 14 unindicted co-conspirators just identified by the Government on November 1, 1988.

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[6] Co-counsel Edwin Williams, counsel for Joyce Rubinstein, has filed a short affidavit at the November 4, 1988 continuance hearing, estimating that merely reviewing and indexing the materials in these nine file drawers would take an experienced lawyer more than one week. Affidavit of Edwin Williams (App. E); Transcript of Motions Proceedings, at p. 30 (App. D).

- Interviewing eight members of the National Caucus of Labor Committees who have already been subpoenaed by the Government to be witnesses at trial.
- Finding the identities of, and interviewing, additional government witnesses.
- Identifying and preparing defense witnesses to rebut or impeach the testimony of prosecution witnesses.
- Locating and preparing defense expert witnesses for both the loan and tax fraud cases and preparing for cross-examination of Government expert witnesses.
- Preparing seven defendants for possible testimony at trial and advising them with respect to the question of whether or not to testify.

Furthermore, petitioner informed Judge Bryan that the Court's denial of the severance motion further compounds the task of document review and preparation. Because of the Court's denial of the severance motion, counsel are essentially forced to prepare two cases for trial: a loan fraud case and a tax fraud case. Transcript of Motions Proceeding, at p. 31 (App. D).

In addition to the time counsel needs to factually prepare their case for trial, counsel told Judge Bryan that they are forced to spend a considerable amount of their time and resources preparing significant motions for the court's consideration prior to the motions deadline of November 7, 1988. Indeed, counsel for all defendants have filed 22 pre-trial motions which are now set to be argued on November 10, 1988. Furthermore, without the review of the massive numbers of documents which have been previously identified, counsel

is unable to determine whether additional motions will be needed.

Having heard counsel's arguments with respect to their request to continue the November 21 trial date, Judge Bryan, summarily denied that request. Judge Bryan denied the request without addressing counsel's assertions that they would be unable to be ready to effectively represent their clients on November 21, 1988. *Id.*, at p. 40 (App. D). Moreover, he rejected the request in the absence of any expressed Government need for trial to commence on that date. Indeed, counsel for LaRouche made it clear to the court that by asking that the trial date be continued until mid-January 1989, petitioner and his co-defendants were not seeking to, in effect, re-argue the transfer motion requiring the Boston prosecution to precede the Alexandria trial, but that all defendants were prepared to ensure that the Alexandria trial would go first. *Id.*, at pp. 32-33 (App. D).

Given this concession, the government failed to articulate any harm to it that would result if the November 21 trial date were continued for 60 days. And so it is for no reason whatsoever that an extraordinary schedule has been set for trial of this case, depriving defense counsel of adequate time to prepare and denying their clients of the legal assistance to which they are constitutionally entitled.

ARGUMENT

A WRIT OF MANDAMUS SHOULD ISSUE DIRECTING THE DISTRICT COURT TO CONTINUE THE TRIAL DATE SET FOR THIS CASE

1. Under the All Writs Act, 28 U.S.C. 1651(a), the courts of appeals have broad power to issue writs of mandamus or prohibition as may be "necessary or appropriate in aid of their

* * * jurisdiction and agreeable to usages and principles of law." In recent years, the Supreme Court and the courts of appeals have not hesitated to use a writ of mandamus in situations requiring the exercise of appellate supervisory power over the district courts. *See generally Schlagenhauf v. Holder*, 379 U.S. 104 (1964) (mandamus or prohibition an appropriate interim remedy for district court's improperly ordering party in civil suit to undergo unnecessary medical examinations); *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) (mandamus to prevent district court from transferring trial of complex cases to special master in clear excess of its authority).

This Circuit has recognized "the usefullness and flexibility of mandamus" and has explicitly embraced the "'more modern ground for the issuance of mandamus—the exercise of an appellate supervisory power.'" *In re Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 539 F.2d 357, 365 (4th Cir. 1976), *quoting Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 524 (D.C. Cir. 1975). *See also United States Bd. of Parole v. Merhige*, 487 F.2d 25, 29-30 (4th Cir. 1973) (noting that this Circuit has declined to follow "the more restrictive and inflexible concept of mandamus"); *United States v. Hemphill*, 369 F.2d 539, 543 (4th Cir. 1966). The caselaw of this Circuit does not establish any one standard for issuing a writ of mandamus in every circumstance. Some cases refer to an abuse of discretion standard, *e.g.*, *Central South Carolina Chapter, Society of Professional Journalists, Sigma Delta Chi v. United States District Court*, 551 F.2d 559, 562 (4th Cir. 1977), while others employ a clearly erroneous standard. *E.g.*, *United States Bd. of Parole v. Merhige*, 487 F.2d at 30. At bottom, though, this Court has emphasized that "*our interest is with effective administration and supervision of the courts of our circuit.*" *In re Virginia Electric*, 539 F.2d at 365, *quoting General Tire & Rubber Co. v. Watkins*, 373 F.2d 361, 370 (4th Cir.) (en banc), *cert. denied*, 386 U.S. 960 (1967) (emphasis in original).

2. The extraordinarily short time for pre-trial motions and trial preparation permitted by the district court here provides an especially appropriate use for the issuance of a supervisory writ of mandamus. We do not deny that "courts have the right to control their docket and require that cases proceed in an orderly and timely fashion." *Van Sant v. Gondles*, 596 F.Supp. 484, 488 (E.D. Va. 1983). Nevertheless, the law does not give courts unbridled discretion over the timing of trials or over, as in this case, the denial of a motion for a continuance. As the Supreme Court cautioned in *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964):

> [A] myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.

This Circuit has closely followed the Supreme Court's teaching in *Ungar*. In *Shirley v. North Carolina*, 528 F.2d 819, 822 (4th Cir. 1975), for example, this Court echoed the *Ungar* doctrine:

> [The] decision to grant or deny a continuance is normally within the discretion of the trial judge. This rule is one of general application, and is grounded in precedent, traditon, and common sense. But discretion can be abused, and in an unusual case the denial of a continuance may be so arbitrary and so fundamentally unfair as to invoke the Constitution.

See also United States v. Sellers, 658 F.2d 230 (4th Cir. 1981).

We recognize the admirable practice in the Eastern District of Virginia of expeditiously moving cases forward. *See* Transcript of Motions Proceedings, at p. 32 (App. D). Prompt resolution of criminal and civil litigation as a general matter serves the interests of all litigants and the ends of justice. Indeed, in the federal system, the Speedy Trial Act, 18 U.S.C. 3161 *et. seq.*, is a comprehensive mechanism designed to protect criminal defendants from the prejudice of undue delay in disposing of criminal charges.

Yet as instrumental as the prompt resolution of litigation may be in doing justice, the broad scope of potential federal criminal and civil litigation makes it unavoidable that justice will require a more deliberate pace in some cases. Justice, after all, must be swift *and sure*. In our adversary system, prepared and effective defense counsel play a central role in achieving a sure and just disposition of a criminal charge.

Even the Speedy Trial Act only requires that the defendant in a routine criminal case be tried within seventy days of arraignment. 18 U.S.C. 3161(c)(1). In a complex case such as this one, the Congress has recognized that the Speedy Trial Act itself is to be tolled for continuances granted where "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. 3161(h)(8)(A). In instructing a court on how to make such an evaluation that a delay is necessary, the Act commands a judge to consider carefully a case that

> is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

18 U.S.C. 3161(h)(8)(B)(ii). This is such a case.

The denial of a request for a continuance in this case arbitrarily and unfairly deprives counsel for Petitioner, and his co-defendants, of even the minimum time needed to come to grips with the mass of evidence underlying this case. The Government has had over two years to identify and prepare the case they wished to bring in Alexandria, seeking an indictment only when they were ready to go to trial. Defense counsel are not in such an enviable position. Even a superficial reading of the 52-page indictment suggests the factual complexity of the Government's allegations. Effective investigation and preparation for trial of those charges is simply impossible in the 32-day time frame allotted by the district court. With the case in this posture, Petitioner, and his co-defendants, are clearly deprived of their constitutional right to assistance of counsel in the "vitally im-portant" period of "consultation, thorough-going investigation and preparation" before trial. *Powell v. Alabama*, 287 U.S. 45, 57 (1932). *See also Avery v. Alabama*, 308 U.S. 444, 446 (1940).

The *Powell* Court's notion of the importance of pre-trial preparation in a criminal case is hardly overstated. This stage is that ground of a criminal defense from which all other steps taken on behalf of a defendant must grow. It is during this period that defense counsel, in order to render effective assistance to the accused, must assimilate and assess all the factual and legal aspects of a case. Once that is done, counsel must apply his expertise and experience to craft what is, in his judgment, the most effective strategy for his client under the law.

As described above, the body of material assembled by the Government alone from which the facts in this case will be proved is massive. Hundreds of boxes of documents must be examined against the facts alleged in the indictment, not from a neutral perspective, but with an eye to fashioning a defense to the Government's specific charges. Even with a division of that task among several counsel, that review and

analysis alone could consume many weeks' worth of work. Many hours of audiotape, and additional quantities of videotape, must be scrutinized. And this effort is not simply a matter of intellectually understanding this material. Relationships between documents, or between documents and witnesses, or between documents and alleged criminal acts must be spotted, considered, and perhaps further investigation in unanticipated directions be undertaken.

Witness identification and preparation, too, poses a formidable task. Thirty-eight individuals, now scattered across the country, may be prosecution witnesses, based on current information. That number could easily grow. Interviewing these people, following up on new leads, and preparing to rebut or impeach their testimony will consume much time. And all this is not even to consider the effort needed to identify and prepare defense witnesses.

It is true, of course, that three of the Alexandria defendants are defendants in the Boston prosecution. Counsel in this case, however, have not uniformly served as counsel in Boston. Mr. Webster, counsel for Petitioner Spannaus, has not been involved in any prior litigation for any of the defendants. Yet even Mr. Odin Anderson, counsel for Mr. LaRouche in Alexandria and also in the Boston case, explained to Judge Bryan that he has been "quite overwhelmed" by the preparation required for this case and "surprised totally by the specifics alleged." Transcript of Motions Proceedings at p. 31 (App. D). He also reminded the court that, even if some of the mass of documents had been used in the Boston case, those relevant to the Alexandria charges promised to be much different. *Id.*, at p. 39 (App. D).

Perhaps even more importantly, the present posture of this case dictates, from any perspective of fairness, how the Boston proceedings must be viewed in this context. Petitioners did move to transfer this case to Boston as a more appro-

priate venue for its disposition. *See* Transfer Motion (App. B). The Government, in opposition, argued that the Boston and Alexandria cases "are quite distinct, as to defendants, charges, and the nature of the underlying schemes." Government's Response to Transfer at p. 1 (App. C). Preparation of cases in Boston and Alexandria would involve, the Government urged, "no waste of resources or duplication of efforts." *Id.*, at p. 14. Apparently persuaded by the Government's position, the district court denied the motion. Presumably, then, both the Government and the court believe that preparation and trial of the Alexandria case is distinct enough from the Boston prosecution to require independent and fresh efforts by counsel.

These objective attributes of the task before counsel for Petitioners, only begin to highlight the fundamental unfairness and arbitrariness of forcing this case to trial on November 21, only 38 days after return of the indictment, and they do underscore the urgent need for mandamus relief. The merits of such relief are made more striking by the fact that the record reveals no possible prejudice to either the Government or the district court if this trial were continued for 60 days.

Moreover, appeal after conviction affords an individual in Petitioners' position only an illusory remedy. How is defense counsel to convince a Court of Appeals that the defense witness not found, or the series of documents not reviewed, would have swayed a jury? Are counsel for Petitioners to do their trial investigation and preparation while preparing an appeal in order to persuade a Court of Appeals that their clients' rights were meaninqfully violated? And even if Petitioners were successful on such an appeal, the remedy would simply be retrial. On retrial, the resources of all involved in this case—those of the defendants, the Government, and the district court—would be expended in a duplicated effort, ironically rendered necessary only by an original trial date

determined by an exaggerated drive for judicial efficiency and economy.

Yet, for purposes of the gravamen of this Petition—the denial of Petitioner's right to effective assistance of counsel for lack of a continuance—this Court has before it now all the essential information it would need to evaluate this issue on appeal. Speculation on what might have happened at trial might have some impact on appellate thinking. Most critical, surely, would be an understanding of the facts and evidence underlying the case, an appreciation of what it was a competent trial lawyer in defense counsels' shoes had to do to effectively represent the defendants in that case, and knowledge of the time given them by the district court in which to do it. All that this Court knows now. A writ of mandamus simply is the only practical remedy, from the perspective of all concerned with this case, for the denial of Petitioners' rights to counsel, notwithstanding the availability of review on appeal. *See General Tire & Rubber Co. v. Watkins*, 373 F.2d at 363-64; *United States v. Hemphill*, 369 F.2d at 543; *In re Ralston Purina Co.*, 726 F.2d 1002, 1006 (4th Cir. 1984) (Bryan, Sr., J., dissenting).

In petitioning the Court for this relief, we bear in mind the admonishment of this Court to both litigants and judges: "Although the expediency of judicial resolution is a valid concern and the scheduling of trials is an important element of the administration of justice, we must bear in mind that the ultimate goal of our system is justice." *United States v. Clinger*, 681 F.2d 221. 223 (4th Cir. 1982), *cert. denied*, 459 U.S. 912, (1982). The denial of a motion for a 60-day continuance in this case sacrifices the right to effective assistance of counsel to an exaggerated, and seemingly reflexive, instinct for the speediest disposition of any litigation. Sixty days is a delay that is necessary, and, in the context of this case, moderate. Based on the district court's summary denial of the continuance, such a delay conflicts with no specific

need of the court nor disrupts some involved exercise of judicial discretion over the court's calendar. Accordingly, issuance of the writ sought by Petitioner to move the trial date would be an appropriate, and narrowly confined, exercise of this Court's supervisory powers.

CONCLUSION

For the foregoing reasons, the Court should issue forthwith a writ of mandamus ordering Judge Bryan (1) to vacate his order of October 17, 1988 that trial of *United States v. Lyndon LaRouche, Jr., et al.*, Cr. No. 88-00243-A (E.D.Va.) begin on November 21, 1988, and (2) to continue the trial date to January 18, 1989, or a date thereafter.

Oral argument on this Petition is respectfully requested.

Dated: November 8th 1988

RESPECTFULLY SUBMITTED,

SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washinqton, D.C. 20037
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By: (sig) Robert J. Cynkar
R. Kenly Webster, P.C.
Robert J. Cynkar
Thomas C. Hill, P.C.
Gadi Weinreich
Attorneys for Petitioner

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

In Re: EDWARD SPANNAUS, *Petitioner*	)	No. 88-05189

SUPPLEMENTAL FILING WITH RESPECT TO EMERGENCY PETITION OF EDWARD SPANNAUS FOR MANDAMUS AND REQUEST FOR EXPEDITED CONSIDERATION

On November 9, 1988, Petitioner Edward Spannaus, on his own behalf and on behalf of his six co-defendants, filed an Emergency Petition for Mandamus and Request for Expedited Consideration seeking relief from Chief Judge Albert Bryan's Order denying Petitioner and his co-defendants a continuance of the trial date currently set for November 21, 1988 in *United States v. Lyndon H. LaRouche, Jr., et al.*, CR No. 88-00243-A (Eastern District of Virginia, Alexandria Division). Petitioner[1] respectfully submits this supplemental filing to further advise this Court of the continuing extraordinary circumstances of this case, all of which are a function of an unyielding rush to trial.

Consistent with the extraordinary schedule laid down by Judge Bryan, all pretrial motions were required to be filed November 7, 1988, a mere 21 days after arraignment. At the same time, defense counsel were expected to continue to

[1] This Supplemental Filing is submitted on behalf of all defendants.

move forward in their broader preparations of the case, including meeting the next two major milestones ordered by Judge Bryan: a requirement that all exhibits be filed with the Clerk five (5) working days before trial, that is, on November 14, 1988 (one week after pretrial motions were due), and the trial date itself, November 21, 1988 (two weeks after pretrial motions were due). Operating under the extreme duress imposed by such an unreasonable schedule, the joint defense team was nevertheless able to file twenty-eight (28) significant and substantive pretrial motions by the deadline set by the court. This Herculean effort was not, however, without its cost: outside of the lack of time to thoroughly prepare each motion, many defense counsel did not have time to read the motions prepared by their co-counsel. In addition, most defense counsel did not have the time to read the Government's responses to the motions before the argument date of November 10, 1988, insofar as many of those responses were not even received until the close of business on November 9, 1988. See Declarations of Defense Counsel (Exh. A).[2]

Argument on the motions was totally shaped by the unyielding pace set by Judge Bryan. Judge Bryan only allowed argument on eight of the twenty-three (23) defense motions set for argument on November 10. Among the motions on which he did not permit argument was Defendants' Motion for Disclosure of Exculpatory Information, which in 62 pages had set out 182 specific *Brady* requests accompanied by a detailed 41-page memorandum explaie significance of the requested material. Judge Bryan did allow argument on the one Government motion filed, a motion *in limine*. On the very same day, November 10, 1988, he summarily denied all of the defense motions. *See* List of defense motions (Exh. B).

[2] Michael Reilly, Counsel for defendant Greenberg, is in Boston on this date and is accordingly unable to produce a Declaration for this Court's consideration. However, Mr. Reilly has been informed of this Supplemental Filing and he joins in it.

At the same time, Judge Bryan granted the Government's broad motion *in limine* to seriously restrict the defense theory of the fraud case. The defendants are charged in the loan fraud portion of the indictment (Counts 1 through 12) with soliciting loans without intention of repayment. The defendants were prepared to demonstrate that their failure to timely meet each and every specific repayment obligation, far from being criminally culpable, was caused by unexpected government and third party financial pressure and political harassment which devastated their abilities to repay on time. Judge Bryan, in granting the Government's motion *in limine*, called into question the admissibility of that evidence. The granting of this motion *in limine* has now forced counsel to fundamentally reshape their concept of a defense of this case, reconsider their understanding of the kind of evidence required for defense, and thereby made the prejudice of the early trial date even more acute. *See* Declarations of Defense Counsel (Exh. A).

In sum, developments since the submission of the original petition:

> (1) have demonstrated the district court's reflexive drive toward an unreasonable trial date in its summary denial of defense motions, some of which would have unavoidably required a delay in the trial date; and
>
> (2) have resulted in a severe narrowing of defense options that has totally disrupted planning of the defendants' case and made even more prejudicial the early trial date set in this case.

Dated: November 14, 1988

RESPECTFULLY,

SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

By: R. Kenly Webster
R. Kenly Webster, P.C.
Thomas C. Hill, P.C.
Robert J. Cynkar
Gadi Weinreich
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Supplemental Filing to Emergency Petition for Mandamus and Request for Expedited Consideration was hand-delivered this 14th day of November, 1988 to:

The Honorable Albert V. Bryan, Jr.
United States District Judge
DISTRICT COURT FOR THE EASTERN
DIVISION OF VIRGINIA
200 South Washington Street
Alexandria, Virginia 22320-2449

Kent S. Robinson
Assistant United States Attorney
Office of the United States Attorney
1101 King Street
Suite 502
Alexandria, Virginia 22314

R. KENLY WEBSTER
SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street N.W.
Washington, D.C. 20037
Counsel for Petitioner Edward Spannaus

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

In Re: EDWARD SPANNAUS, *Petitioner*	)	No.

AFFIDAVIT OF ATTORNEY ODIN P. ANDERSON IN SUPPORT OF PETITION FOR MANDAMUS

COMMONWEALTH OF VIRGINIA

ss.

CITY OF ALEXANDRIA

I, Odin P. Anderson, do depose and say:

1. I am an attorney-at-law, in good standing, admitted to practice before the bar of the Commonwealth of Massachusetts, Federal District Court for Massachusetts, the First and Second Circuit Courts of Appeal, and the United States Supreme Court.

2. I am counsel for Lyndon H. LaRouche, Jr. in the case which underlies this petition.

3. Since October 17, 1988, the arraignment date herein, my associate Robert Rossi and I have spent only five working days in our office in Boston, Massachusetts, the remainder of our time has been spent in Virginia and Washington, D.C. preparing for this trial.

4. As a result of the denial of severance motions, our efforts have been directed towards two separate conspiracy

charges; a "Kline" type tax conspiracy and a fraud conspiracy, plus twelve substantive fraud counts.

5. Virtually the entire time between arraignment, October 17, 1988, and our motions hearing date of November 10, 1988, a period of 17 days, was devoted toward the preparation of motions, coordination of counsel's efforts, and preparation for argument.

6. Despite the best efforts of all counsel and support staff involved, it is clear to me that our level of comprehension of issues, evaluation of facts and strategies, and overall pretrial motion practice were defecient as a direct result of the crush of time and the limits of human endurance.

7. As the trial judge has denied the defense any continuance of the trial date herein, we had only ten days, inclusive of weekends and holidays, between the motions date and the commencement of trial which is scheduled for November 21, 1988.

8. Given the complexity of the issues presented; the vast number of documents produced by the Government by way of discovery, or otherwise obtained, which require comprehension; the mulitude of witnesses (both Government and Defense) which must be prepared for; and the development of strategies for the defense of a case which has been under investigation by the government for over four years; it is impossible to accomplish these tasks within the time alloted, with the degree of professional responsibility required to provide my client (or any other defendant, in my view) with an adequate and competent defense.

9. In my twelve years of trial practice as a prosecutor and defense counsel, engaged in civil and criminal trial work, in the public and private sectors, I have never had so little time to prepare a case for trial, even a simple misdemeanor.

Further the deponent sayeth not,

ODIN P. ANDERSON

Sworn to before me
this 14th day of November, 1988.

Mary Jane Freeman
Notary Public

My commission Expires
March 24, 1989

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 88-00243-A
LYNDON H. LAROUCHE, JR., et al.	)	
Defendants.	)	

AFFIDAVIT

COMMONWEALTH OF VIRGINIA	)	
	)	ss:
COUNTY OF FAIRFAX	)	

Edwin A. Williams, being duly sworn, deposes and says:

1. I am counsel for Joyce Rubinstein, one of seven defendants in this case.

2. On October 21, 1988, defendants were arraigned and trial was set for November 21, 1988. Defendant Rubinstein was arraigned on one count of conspiracy to commit mail fraud, in violation of 18 U S.C. Sec. 371, and on two substantive counts of mail fraud, in violation of 18 U.S.C. Sec. 1341. She pleaded not guilty to all three counts.

3. On November 7, 1988, defendants filed more than 20 pretrial motions. At the same time the government filed a motion *in limine* seeking to severely limit defendants' presentation of evidence of their defense that they were unable to repay the loans which are the subject of the indictment because of government harassment and interference with defen-

dants' fund-raising activities. Specifically, the government by its motion *in limine* sought to exclude evidence that it alone was the one creditor that put three LaRouche fund-raising organizations into involuntary bankruptcy, that it caused the FBI to infiltrate LaRouche organizations, and that it instituted intelligence and security activities directed at the finances and political activities of persons and organizations associated with LaRouche.

4. On the morning of November 10, 1988, the District Court heard argument on five or six of defendants' motions and on the government's motion *in limine*; whereupon, the Court indicated that it would issue a written order.

5. On Saturday, November 12, defense counsel received the Court's Order, dated November 10, 1988, denying all of defendants' pre-trial motions, but granting the government's motion *in limine*. As to the government's motion *in limine* and the defendants' related Notice, filed pursuant to Sec. 5 of the Classified Information Procedures Act, the Order states:

> F. Insofar as the motion *in limine* of the United States and the related Notice of the defendants pursuant to Sec. 5 of the Classified Information Procedure Act (CIPA), it is
>
> ORDERED that the motion *in limine* of the United States is granted to the following extent only:
>
> 1. Reference to the bankruptcy proceedings as a reason for non-payment of the loans which are the subject of the indictment will be permitted; that the bankruptcy was an involuntary one, i.e., at the instance of other [sic] creditors, will be admissible; that the government was the creditor which initiated the involuntary bankruptcy proceeding will not be admitted because the court, pursuant to F. R. Evid.

403, concludes that admission of testimony that the United States was the petitioning creditor would necessitate inquiry into the nature of the debts owed the United States as a result of contempt proceedings, and would divert the jury from the issues raised by the indictment.

2. Evidence as to other FBI or law enforcement activities, use of informants (other than possible impeachment should the informant testify), FBI infiltration, intelligence or security activities directed at the finances and political activities of persons and organizations associated with LaRouche will not be admitted, except that the defendants may show that there were unexpected actions by some outside influence, including the government, which had the effect of frustrating their expectation that repayment would be made. Even than the court will not allow a delving into any details of alleged infiltration, financial warfare, etc., for the reason that under F. R. Evid. 403, this would divert the jury from the issues raised in the indictment.

For those same reasons, the notice under Sec. 5 of CIPA is insufficient to invoke the further procedures outlined in that Act.

In connection with the motion *in limine*, the court recognizes that circumstances may develop at trial which renders admissible evidence which at this point does not appear to be so; consequently, this ruling is not written in stone, although counsel are admonished not to mention the matters covered in this ruling in their opening statement.

6. As a result of the District Court's Order of November 10, which essentially eliminated almost all of the defense's affirmative defense, undersigned counsel has been compelled

to re-evaluate and begin to revamp defendant Rubinstein's case. Moreover, because of the magnitude of the evidence counsel must now re-evaluate and prepare before trial, there are not enough hours in the days remaining between now and November 21, for counsel to be ready.

7. Undersigned counsel therefore believes that if the trial date of this case is not continued until at least mid-January 1989, he will be unable to render effective assistance of counsel to his client, Joyce Rubinstein.

Edwin A. Williams

Sworn and subscribed to before me this 14th day of November 1988.

Marilyn I. King
Notary Public

My commission expires:
February 24, 1990

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In Re: EDWARD SPANNAUS, *Petitioner*	)	No. _____

AFFIRMATION OF JAMES C. CLARK, COUNSEL FOR MICHAEL BILLINGTION IN SUPPORT OF PETITION FOR MANDAMUS FILED BY EDWARD SPANNAUS

I, JAMES C. CLARK, Counsel for Michael Billington, one of seven co-defendants in the case of *United States v. Lyndon H. LaRouche. Jr, et al*, Criminal No. 88-00243-A, (Eastern District of Virginia, Alexandria Division), do hereby state under oath and under penalty of perjury that I cannot be prepared to adequately defend my client at the trial of this case scheduled to begin on November 21, 1988 at 10:00 a.m.

1. I was retained to represent Michael Billington at the trial of this case on or about October 12, 1988. On October 14, 1988, I received a copy of the indictment returned against Mr. Billington and on October 17, 1988, he was arraigned and his case set for trial on November 21, 1988.

2. Although I have represented Mr. Billington in the Circuit Court for Loudoun County, Virginia since February 1987, this representation is in reference to allegations that Mr. Billington sold unregistered securities and acted as an unregistered securities broker. The legal and factual issues involved in the state prosecution are factually distinct from those involved in this case and the preparation that I have done for the state case is of little value in this case.

3. Since receiving the indictment in this case, I, along with other counsel, have divided my time between preparing and arguing the numerous motions that were considered by the Court on November 10, 1988, and attempting to locate and interview witnesses that may be called by the prosecution or may be necessary for the defense of this case.

4. Central to the defendants' theory of their case is that any delinquency in repayments of loans made by supporters of their organization was occasioned by government infiltration, harassment and financial warfare. I have devoted substantial trial preparation toward advancing that defense.

5. By its order of November 10, 1988, the District Court has ruled that the government is not required to provide, as exculpatory evidence, evidence in its possession of government infiltration, harassment and financial warfare, and the defense may only introduce that evidence to show that there were unexpected actions from an outside influence, including the government, which had the effect of frustrating the expectation that repayment would be made. The showing will be made much more difficult by virtue of the court's failure to require the government to provide to the defense information in its possession regarding those outside influences.

6. Mr. Billington is in a particularly disadvantageous position, that he is indicted simply as a fundraiser who solicited contributions and loans for various political organizations connected to Lyndon LaRouche. He is forced, given the trial court's denial of our motion for severance, to defend this case along with Mr. LaRouche who is charged in a separate count with conspiracy to conceal assets from the Internal Revenue Service and thereby avoid the payment of income taxes. Mr. Billington has no knowledge of the facts leading to this allegation and although he is not alleged to be a co-conspirator, either indicted or unindicted, he still must be prepared to address the issues in that case to the extent the jury may infer

an evil motive to him as a possible purveyor of income to Mr. LaRouche.

WHEREFORE, for the reasons stated herein, I state, under oath, that in order to adequately defend Mr. Billington, I cannot be prepared to go to trial on November 21, 1988, but require considerable additional time to prepare for the legal and factual issues that are likely arise during the course of this trial.

JAMES C. CLARK
LAND CLARK, CARROLL &
MENDELSON, P. C.
600 Cameron Street
P. O. Box 19888
Alexandria, Virginia 22320-0888
(703) 836-1000

STATE OF VIRGINIA:
CITY OF ALEXANDRIA, to wit:

I, the undersigned, a Notary Public in and for the State aforesaid, do hereby certify that JAMES C. CLARK, whose name is signed to the foregoing *AFFIRMATION OF JAMES C. CLARK, COUNSEL FOR MICHAEL BILLINGTON IN SUPPORT OF PETITION FOR MANDAMUS FILED BY EDWARD SPANNAUS* dated November 14, 1988, has acknowledged the same before me.

Given under my hand and seal this 14th day of November, 1988.

Lynda L. Flynn
Notary Public

My commission expires: Sept 22, 1991

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

v. : APPEAL NO. _____

LYNDON H. LA ROUCHE, et al, :
Defendants.

AFFIDAVIT OF WILLIAM B. MOFFITT

COMMONWEALTH OF VIRGINIA,
AT LARGE, TO-WIT:

I, William B. Moffitt, hereby depose and swear:

1. That I am a practicing attorney licensed to practice in the Commonwealth of Virginia.

2. That I have been a member of the bar of the United States District Court for the Eastern District of Virginia since 1976.

3. That I am a member of the Board of Directors of the National Association of Criminal Defense Lawyers and past President of the Virginia College of Criminal Defense Lawyers.

4. That, throughout my practice in the Eastern District of Virginia, it has been the policy of the Court to require accused to proceed to trial in less than sixty days in criminal cases. Further it has been the practice of the Court to treat all criminal cases alike with respect to the time needed to prepare; that is to say, complex fraud and conspiracy cases

are treated the same way as common law robbery or larceny cases.

5. That it has been the policy of the Court to require the United States government to be ready to try a criminal case at the time of arraignment. Thus, the government is permitted to take whatever time it deems necessary to prepare a case prior to indictment and the accused are expected to prepare for trial, no matter how complex, in less than sixty days.

6. That it has further been the policy of the Court to attempt to hear and resolve all criminal motions, whether discovery or substantive motions, within a two hour period on Friday mornings, prior to hearing the civil docket which extends into the afternoon.

7. That, in my experience, the above cited policies have had the effect of discouraging accuseds from going to trial and coercing pleas of guilty.

8. In the instant case, *United States v. Lyndon H. LaRouche, et al.*, the accused have been required to prepare for trial in thirty-four days, in a case involving hundreds of thousands of documents, two conspiracy counts and substantive mail fraud counts. The government has had well in excess of eighteen months to prepare for trial.

10. Your affiant, prior to the District Court's ruling on November 10, 1988, informed the District Court that he could not be prepared to try the case on November 21, 1988.

On November 10, 1988, motions were heard in *United States v. Lyndon H. LaRouche, et al.* On November 12, 1988, counsel received the Court's Order. Of particular interest with respect to this affiant, is the Court's ruling regarding the government's Motion in Limine.

As a result of the Court's ruling on the government's Motion in Limine, as counsel for Dennis Small, I am now required to retool and revise my defense in one week's time. In addition, the Court has required the defense to file all of its exhibits if they are going to put on a case on November 14, 1988.

It is impossible for me to comply with the Court's Order with respect to trial exhibits inasmuch as I am still trying ro revise my defense to comply with the Court's Order of November 10, 1988.

As an officer of this Court, I aver that there is simply no way that I can adequately prepare for trial on November 21, 1988 and provide Dennis Small effective assistance of counsel in accordance with the Sixth Amendment to the United States Constitution.

10. That, as a result of my limited ability to prepare this case and the need to retool Mr. Small's defense, a conviction is inevitable if forced to trial on November 21, 1988. In my opinion, with respect to Mr. Small, such conviction would result from the inequities in preparation time afforded the accused and the prosecution.

William B. Moffitt
Counsel for Defendant Dennis Small

SUBSCRIBED and SWORN to before me, a notary public, this 14th day of November, 1988.

Joyce L. Sanderi

My commission expires Oct 20, 1992

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

In Re: EDWARD SPANNAUS, *Petitioner*	)	No. 88-05189

DECLARATION OF R. KENLY WEBSTER

I, R. Kenly Webster, declare:

1. I am counsel for Petitioner Edward Spannaus in this matter. Mr. Spannaus, along with six other individuals, is a Defendant in *U.S. v. LaRouche, Jr., et al.*, CR. No. 88-00243-A (Eastern District of Virginia, Alexandria Division).

2. I was admitted in the case as counsel for Petitioner Spannaus on October 21, 1988. Before that date, I had not appeared for Petitioner Spannaus in any other criminal or civil proceeding.

3. The indictment facing Petitioner Spannaus charges him with participation in a loan fraud scheme and charges one of the co-defendants, Lyndon H. LaRouche, Jr., with a separate conspiracy to defraud the Internal Revenue Service. However, the government has identified Petitioner Spannaus as an unindicted co-conspirator in the tax conspiracy charge.

4. As is not uncommon in fraud and tax conspiracy cases, this case is heavily based on documentary evidence. However, the complexity of the case is indicated by the extraordinary volume of the documentary material.

5. At this time, over two million documents seized from the defendants, approximately seven cartons of Rule 16 mate-

rial, and about 1,500 pages of *Jencks* material have been identified as possibly relevant to this case. To date I have not been able to review virtually any of this material.

6. Judge Bryan ordered that all pre-trial motions were to be filed November 7, 1988, only 21 days after arraignment and fourteen days after my appearance in the case. Accordingly, I focused most of my efforts at meeting that deadline, and, as part of the joint defense team filed or joined in 28 pre-trial motions. Time did not permit review of all the motions submitted or of the Government responses prior to oral argument held on November 10, 1988. Judge Bryan summarily denied all defense motions that same day.

7. Since the vast majority of our time has been consumed by preparing and arguing pre-trial motions, we have not been in a position to undertake the broad range of activities needed to prepare a defense for a prosecution of this size and complexity.

8. Thus, at this time—only one week before the beginning of this trial—I have not had the opportunity to interview many of the prosecution witnesses scattered across the United States.

9. I have had insufficient time to review and analyze the mass of documentary evidence to identify potentially useful impeachment material or material to support an affirmative defense against the charges.

10. I have not had sufficient time to identify and interview potential defense witnesses.

11. At this point, I have not even had the opportunity to thoroughly interview as client, Petitioner Spannaus concerning the events in the fifty-two-page indictment which cover almost four years from July 1983 until "at least" April

19, 1987, or to thoroughly review the documentary evidence that clearly relates to him. Most critically, for example, I have not yet been able to review the 17 personal notebooks of Petitioner Spannaus that had been seized by the Government.

12. Because I have not been able to come to grips with the documentary and testimonial evidence that may be relevant to this case, I have not yet been able to develop a concise strategy for the defense of this case on behalf of Petitioner Spannaus. As a result, I have been unable to prepare an opening statement, demonstrative exhibits such as charts that might be useful in helping the jury understand any defense theory or assess use of possible expert witnesses.

13. Not being in a postiion to develop a theory and structure for the defense of this case, for the reasons described above, I have been unable to identify defense goals for jury selection and otherwise prepare for an effective voir dire.

14. There are numerous other activities and preparations which I must do to effectively represent my client which cannot be accomplished before November 21, 1988. I am precluded from specifically identifying this preparation because to do so would violate Attorney/Client and Attorney work product privileges.

15. There are a range of other tasks that cannot be anticipated at this stage of limited preparation, but which I, as an experienced trial lawyer, know unavoidably arise after evidence is analyzed and defense preparation are well advanced.

16. Pursuant to 28 U.S.C. 1746, the undersigned declares under penalty of purjury that the foregoing is true and correct.

Executed this 10th day of November, 1988.

R. Kenly Webster

R. Kenly Webster, P.C.

Counsel for Petitioner Edward Spannaus

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	CRIMINAL NO.
v.	)	88-00243-A
LYNDON H. LaROUCHE, JR., et al.	)	

AFFIDAVIT OF BRIAN P. GETTINGS

I, BRIAN P. GETTINGS, first duly sworn upon oath, do hereby state as follows:

1. I am counsel for William R. Wertz in this case. I was retained on September 29, 1988. I had previously represented other supporters of Lyndon H. LaRouche who are defendants in the criminal proceedings in the Circuit Court for Loudoun County, Virginia and who were compelled immunized witnesses before the grand jury which returned this indictment. As a result, I had some familiarity with the LaRouche organization and the particulars of its fundraising so that I would be better prepared as a lawyer than someone without that background to meet the early trial date one always anticipates in the Alexandria Division of the United States District Court for the Eastern District of Virginia. It was anticipated at the time I accepted the representation that an indictment would be returned on or about October 14, 1988 ("the middle of October," according to government counsel). Ordinarily, arraignment would take place the following Friday, October 21, 1988. A trial date no earlier than January 3, 1989, because of the Christmas holidays, would reasonably result.

2. I am counsel for a defendant, M. Gerard Chauvin, in the case of *United States v. Green Thumb Enterprises. Inc.*,

et al., Criminal No. 88-236-A in the Alexandria Division of the United States District Court for the Eastern District of Virginia. The indictment against Mr. Chauvin and others was returned on October 3, 1988, arraignment took place on October 11, 1988 and trial was set for December 12, 1988. This appeared to be a reasonable schedule at the time.

3. The indictment in this case was returned on October 14, 1988, arraignment was accelerated to October 17, 1988 and trial was set for November 21, 1988, thirty four (34) days from the arraignment. Defense counsel, including myself, were stunned by this date inasmuch as the United States had been investigating the matter for no less than two years—search warrants were executed on October 6, 1986 and no special reason was advanced by the government at the arraignment for accelerating the trial. Within days after the arraignment it became apparent that no defense counsel, including myself, could possibly be prepared to go to trial on November 21, 1988.

4. My time sheets reflect that between October 14, 1988 and November 11, 1988 I have billed 124.8 hours to the preparation of this case for trial. I am able to devote about one-half of my time to this endeavor because I have other clients whose matters likewise need attention. Because of the rush to trial in this case, it is a matter of grave concern to me that all my clients' matters will suffer, including Mr. Chauvin's, whose trial date once looked reasonable to me but which now is also suffering from lack of preparation on my part.

5. Mr. Wertz is alleged by the government to have been in charge of fundraising for the LaRouche organization. The trial preparation for Mr. Wertz in this case involves a detailed analysis of the financial records covering a period of years of the several entities which can be described loosely as comprising the LaRouche organization. A principal part of his defense

is that he had a reasonable good faith belief that the loans in question would, each of them, be paid back because the financial history of the organization was such that they could and would be paid back, absent unforeseen circumstances. Advancing this defense requires the services of accountants, one of whom has been engaged to be an expert witness. His preliminary review of those records which are readily available to us—those which are not still in the physical custody of the government—indicates that his testimony will substantially support and advance that defense. His examination of the records is by no means complete owing to the fact that many of them are still in the custody of the government and are not readily available. He has not even begun to construct charts, graphs, etc. to accompany and explain his testimony and, at this point, I will be deprived of making anything but the vaguest and most general reference to his expected testimony in my opening statement. I will, moreover, be unable to intelligently cross-examine "financial" witnesses who testify in the government's case-in-chief. In short Mr. Wertz will be deprived of an effective opening statement by his counsel and effective cross-examination of government witnesses.

I have been practicing law for twenty-six (26) years with the time spent almost equally divided between being a federal prosecutor and a private practitioner. In this latter endeavor, I have done considerable federal criminal defense work. I have learned that in the criminal justice system there is always to be sought a balancing of two, sometimes competing interests, guaranteed by the Constitution to all citizens. One is the security from lawlessness guaranteed to all which militates strongly towards speedy and certain justice. The other is a fair trial for all accused of, but not yet proven guilty of, that lawlessness. This militates strongly towards permitting an accused adequate time to prepare a defense. In this case, there is no reason why these two interests need compete. Both can be adequately served by a trial date on or after

January 3, 1989. Otherwise, how will Mr. Wertz ever be convinced he received a fair trial?

FURTHER DEPONENT SAYETH NOT.

BRIAN P. GETTINGS

COMMONWEALTH OF VIRGINIA :
: To-Wit
COUNTY OF ARLINGTON :

I, the undersigned, a Notary Public in and for the jurisdiction aforesaid, do hereby certify that BRIAN P. GETTINGS whose signature is affixed to the foregoing document, has personally appeared and acknowledged the same before me in my jurisdiction aforesaid this 14th day of November, 1988.

Elaine B. Green
NOTARY PUBLIC

My Commission Expires: June 10th, 1991

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

X — — — — — — — — — — — — — — — X

UNITED STATES OF AMERICA	:	
-vs-	:	CRIMINAL ACTION
	:	NO. 88-243-A
LYNDON LaROUCHE, et al.,	:	
Defendants.	:	

X — — — — — — — — — — — — — — — X

Friday, November 18, 1988
Alexandria, Virginia

Transcript of motion proceedings in the above-captioned matter.

BEFORE:
The Honorable ALBERT V. BRYAN, JR., Judge
United States District Court

APPEARANCES:
FOR THE UNITED STATES:
KENT ROBINSON, ESQUIRE
Assistant U. S. Attorney
1101 King Street, Suite 502
Alexandria, Virginia

JOHN MARKHAM, ESQUIRE
U. S. Attorney's Office
Boston, Massachusetts

* * * *

PROCEEDINGS

THE CLERK: Criminal No. 88-243-A, United States versus Lyndon LaRouche, Jr., William Wertz, Edward Spannaus, Michael Billington, Dennis Small and Paul Greenberg and Joyce Rubinstein.

MR. ROBINSON: Kent Robinson and John Markham for the United States.

THE COURT: The matters that are on the docket this morning all seem to be motions for reconsideration. I do not intend to hear any argument on the renewed motion for continuance. And I will hear argument on the renewed motion to vacate the deadline for filing exhibits mainly because I am concerned that apparently no exhibits at all have been filed. That's a little risky way to travel, Mr. Webster, but I will hear you on it.

MR. WEBSTER: I must admit after the pathos and emotion of that sentencing, I really don't feel like arguing right now, but —

THE COURT: Well, I share that.

MR. WEBSTER: I would like to say one thing about the motion for reconsideration on the trial delay. I know Your Honor has heard us fully.

THE COURT: I really don't want to hear any more about that, Mr. Webster. It's reached a point where it's no longer a motion. It's a lament, and the wailing and moaning and so on has gone on as long as I am going to hear it. You men are big men. You have tried cases before, I assume. You are experienced. I am sure you have tried cases under adversity. I will accept that this is going to be a trial under adversity for you, but I am not going to hear any more wailing and

moaning and carrying on and bellyaching about why I can't be ready for trial.

MR. WEBSTER: I understand that, Your Honor. My client has asked me whether he can make a brief statement in this regard. I pass that on to the Court.

THE COURT: No, I am not going to hear it.

MR. WEBSTER: Would Your Honor accept a declaration he has signed in connection with this matter as part of the Court record, Your Honor.

THE COURT: Well, you can file it, of course. If it is addressing the issue of continuance, I am unwilling to hear any more on that.

MR. WEBSTER: It is addressing that issue, Your Honor.

We will file it with the Court.

* * * *

APPENDIX H

VOLUME I-A
IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

X — — — — — — — — — — — — — — — X

UNITED STATES OF AMERICA	:	
-vs-	:	CRIMINAL ACTION
	:	NO. 88-243-A
LYNDON LAROUCHE, et al.,	:	
Defendants.	:	

X — — — — — — — — — — — — — — — X

Monday, November 21, 1988
Alexandria, Virginia

Transcript of impaneling of the jury on the first day of trial in the above-captioned matter.

BEFORE:

The Honorable ALBERT V. BRYAN, JR., Judge
United States District Court

APPEARANCES:

(As heretofore noted:)

* * *

P R O C E E D I N G S

THE CLERK: Criminal Action No. 88-243-A, United States versus Lyndon H. LaRouche, Jr., William Wertz, Edward Spannaus, Michael Billington, Dennis Small, Paul Greenberg and Joyce Rubinstein.

This case comes on for trial by jury. Are counsel ready?

MR. ROBINSON: The United States is ready, Your Honor.

MR. ANDERSON: I am not ready for trial on behalf of Lyndon LaRouche, Your Honor.

THE COURT: Other than the motions that have been filed requesting that the matter be continued, we will proceed with trial. I am sorry for the crowding. I think that will ease once we have the jury selected.

MR. WEBSTER: May I say, Your Honor, I am not ready on behalf of Defendant Spannaus for trial for the reason stated in the affidavit submitted.

MR. MOFFITT: That goes for all of us, Your Honor.

THE COURT: I understand.

THE CLERK: Ladies and gentlemen of the jury, will you please stand and raise your right hands.

(Whereupon, the jury panel was duly sworn.)

THE COURT: Members of the jury, you have for trial beginning today a criminal case, in which there are seven defendants charged. Those defendants are: Lyndon H. LaRouche, Jr., William Wertz, W-e-r-t-z, Edward Spannaus, S-p-a-n-n-a-u-s, Michael Billington, Dennis Small, Paul Greenberg, and Joyce Rubinstein.

They are charged in a 13-count indictment. Count I charges that from January 1985 to April 1987, the defendants conspired with each other and others to devise a scheme to defraud and to obtain money by false pretenses through the use of the mails.

Counts II through XII charge that the defendants actually did what in Count I they are charged with conspiring to do.

Count XIII charges only Mr. LaRouche, and that is a charge that beginning on or about 1979 and continuing until

October of 1988, he did, he with others, did conspire to defraud the United States by impeding the lawful function of the Internal Revenue in its ascertainment of his personal income taxes.

The defendants have pled not guilty to all charges, and you are here today and perhaps more than today to try the case.

Now, the Government is represented by Assistant United States Attorneys Kent Robinson, John Markham, and Mark Rasch.

The defendant, Mr. LaRouche, is represented by attorneys Odin Anderson and Frederick Sinclair; the defendant, Mr. Wertz is defended by attorney Brian Gettings; the defendant, Mr. Spannaus, is represented by attorney Kenley Webster; the defendant, Mr. Billington, is represented by attorney James C. Clark; the defendant, Mr. Small, is represented by Mr. William Moffitt.

MR. WILLIAMS: Your Honor, you missed a couple of us.

THE COURT: I'm sorry.

Mr. Greenberg is represented by Mr. Michael Reilly and Mr. Daniel Alcorn, and Ms. Rubinstein is represented by Mr. Edwin Williams.

It was not a deliberate oversight, gentlemen.

MR. ROBINSON: In addition, Your Honor, there is one further attorney for the Government, Mr. John Fitzgerald.

THE COURT: John Fitzgerald.

MR. ROBINSON: Thank you, Your Honor.

MR. WEBSTER: Your Honor, in addition, Mr. Tom Hill is here on behalf of Defendant Spannaus.

MR. MOFFITT: Miss Lisa Kemler is here on behalf of Mr. Small.

MR. ANDERSON: Attorney Robert Rossi on behalf of Mr. LaRouche, Your Honor.

THE COURT: Before giving you or inquiring of you whether you know anything about this case, I will perhaps give you a little lecture in the civic responsibilities of good citizens, which you don't need.

The case could conceivably last three or four weeks. It might not last that long, but it is possible that it could or maybe a little longer.

During that time, you would probably sit on Monday through Thursday although this week you would only be required to sit Monday through Wednesday. Normally, I would not sit on Fridays, although if we could finish a witness or a case by sitting on a Friday, we probably would.

During the trial, you would not be kept overnight. That is, we would not sequester you. We would be hearing testimony during the day from approximately 10:00 to 5:30 or 6:00, and then you would be allowed to go home for the evening.

Jury service can be onerous. It is a responsibility however that goes with the privileges of citizenship. Many of you are busy. Many of you have other obligations. To some to serve on a jury, particularly one that long may be a hardship or a sacrifice. However, these defendants and the Government are entitled to have their case decided by a jury composed of their fellow citizens.

On the other hand, the parties do not want someone on the jury who may be so distracted by his or her other personal or business matters that he or she is unable to give undivided attention to the case.

I am going to ask you if after this brief lecture which as I say I am sure you don't need, if any of you feel that service on this jury, in this case, is going to cause a sacrifice on your

part that is too great or that will cause you to be unable to give your undivided attention to the case. I therefore ask if there are any of you who because of those considerations feel you could not sit on the case?

If there are, would you raise your right hand? Or either hand.

All right, will you give me your name, please, and —

A JUROR: My name is Robert Reif, Your Honor. R-e-i-f.

THE COURT: All right. Mr. Reif, you will be excused.

A JUROR: Beatrice Williams.

THE COURT: Ms. Williams, you will be excused.

Yes?

A JUROR: Renee Sutter.

THE COURT: Ms. Sutter, you will be excused.

A JUROR: Gordon Schultz.

THE COURT: Mr. Schultz, you will be excused.

A JUROR: Tommy Kelly.

THE COURT: Mr. Kelly, you will be excused.

A JUROR: Young Kim.

THE COURT: Young Kim. You will be excused.

I'm sorry. I didn't catch your name?

A JUROR: Last name is Mazza, M-a-z-z-a.

THE COURT: Ms. Mazza, you will be excused.

Yes?

A JUROR: Linda Ware.

THE COURT: Ms. Ware, you will be excused.

Yes?

A JUROR: Karen Hamilton.

THE COURT: Ms. Hamilton, you will be excused.

Yes?

A JUROR: Gregory Dye.

THE COURT: Mr. Dye, you will be excused.

A JUROR: Stephanie Rogers.

THE COURT: Ms. Rogers, you will be excused.

Yes?

A JUROR: John Murphy.

THE COURT: Mr. Murphy?

THE JUROR: Yes, sir.

THE COURT: You will be excused.

A JUROR: Art Tunstall.

THE COURT: Mr. Tunstall, you will be excused.

A JUROR: Lee Versteeg.

THE COURT: Mr. Lee Versteeg, you will be excused.

A JUROR: Gary Feth.

THE COURT: Mr. Feth, you will be excused.

A JUROR: Lawrence Dausin.

THE COURT: Mr. Dausin, you will be excused.

If you will stand and give me your name.

A JUROR: Michael Lewis.

THE COURT: Mr. Lewis, you will be excused.

A JUROR: Thomas Everhart.

THE COURT: Mr. Everhart, you will be excused.

A JUROR: Nancy Wallace.

THE COURT: Ms. Wallace, you will be excused.

A JUROR: Betty Maddox.

THE COURT: Ms. Maddox, you will be excused.

A JUROR: Theresa Adams.

THE COURT: Ms. Adams, you will be excused.

A JUROR: Bettie Teevan.

THE COURT: Ms. Teevan, you will be excused.

A JUROR: Cary Gaulding.

THE COURT: Mr. Gaulding, you will be excused.

A JUROR: Debora Neubauer.

THE COURT: Ms. Neubauer, you may be excused.

A JUROR: Zane Blake.

THE COURT: Mr. Blake, you may be excused.

A JUROR: Aaron Bowles, Your Honor.

THE COURT: You may be excused.

A JUROR: Greg Vogel.

THE COURT: Mr. Vogel, you will be excused.

A JUROR: Vernett Taylor.

THE COURT: Ms. Taylor, you may be excused.

I will ask those persons that I have excused to leave the room.

(Whereupon, the excused jurors left the room.)

THE COURT: I will ask those jurors who are in this section of the courtroom to move over to here, please.

I think there are some seats over on the far side.

The defendants in this case have been in the publicity.

For that reason, I ask whether anything you may have read or heard or seen has caused you to form any adverse opinion or belief about any of these defendants or about their guilt or innocence in this case.

Now, the question was whether you formed any adverse opinions. So I am going to ask you in a minute whether you have read or heard anything about this case. But this particular question is whether you have read or heard or seen anything that has caused you to form any adverse opinion or belief about any of these defendants or about their guilt or innocence of the charges in this case.

All right.

Will you stand and give your name, please.

A JUROR: Edward Monk.

THE COURT: And is what you have heard or read been such that you have already formed an adverse opinion?

THE JUROR: Yes, Your Honor.

THE COURT: All right. Mr. Monk, you will be excused.

You may leave. You will be asked to go to another courtroom.

Yes?

A JUROR: Sue Mangan.

THE COURT: Ms. Mangan, has what you read or heard been such that it would cause you to have an adverse opinion of these defendants?

THE JUROR: I have formed opinions and it would be very difficult for me to give an impartial judgment.

THE COURT: All right. You are excused.

Yes, sir?

A JUROR: David Harris.

THE COURT: Mr. Harris. Have you formed an opinion of these defendants that is sufficiently adverse that would affect your ability in this case?

THE JUROR: Yes, sir.

THE COURT: You will be excused, sir.

A JUROR: Linda Becker.

THE COURT: Ms. Becker, have you formed an opinion as to these defendants?

THE JUROR: Yes, I have.

THE COURT: And it would be adverse?

THE JUROR: Yes. I am afraid so.

THE COURT: All right. You will be excused.

A JUROR: Barbara Sigrist.

THE COURT: Miss Sigrist, you have formed an opinion as to these defendants?

THE JUROR: Yes.

THE COURT: Is it adverse?

THE JUROR: Yes.

THE COURT: And would it affect your ability in this case?

THE JUROR: Yes.

THE COURT: All right. You will be excused.

Yes, sir?

A JUROR: Daniel Wilson.

THE COURT: And have you formed an opinion that is adverse to these defendants?

THE JUROR: Yes, sir, I have.

THE COURT: All right. You will be excused, sir.

Yes?

A JUROR: Virginia Crane.

THE COURT: Ms. Crane, have you formed an opinion as to these defendants which would be adverse?

THE JUROR: Yes, I have.

THE COURT: You will be excused.

THE JUROR: Thank you.

THE COURT: There has been some publicity about this case. Have any of you read or heard or seen anything about this case?

I will ask if you will come up one by one through that opening in the jury rail and then I will ask you some questions at the Bench. Would counsel approach the Bench?

(Thereupon, a conference was held at the Bench with Court and counsel, out of hearing of the jury, and reported as follows:)

MR. MOFFITT: I have an objection, Your Honor. I am concerned that the first question that you asked these people had they formed an adverse opinion and that it may have polluted these other people with respect to that. We object to that.

THE COURT: I am going to take these people up one at a time. I recognize the difficulty that you are having. If some of you want to come around here, I don't mind that, if you don't mind.

Don't be intimidated by all of these people. They are perfectly all right.

What is your name, sir?

A JUROR: Theodore Kutzlo.

THE COURT: Do you remember what it was you read or heard about?

THE JUROR: No, sir. I read the newspaper. Watch TV reports, but I have not formed any opinion.

THE COURT: Do you remember what it was particularly that you read?

THE JUROR: What I saw was the Leesburg incident and it has been months. I can't really remember the details.

THE COURT: Mr. Kutzlo, is that your name, sir?

THE JUROR: Yes, sir.

THE COURT: Did you follow up on it to find out any more about it?

THE JUROR: No, sir. I didn't follow up. I just remember reading about it and seeing it in the paper.

THE COURT: Did it have anything to do with this particular case?

THE JUROR: No, sir. I just know the names and the incidents, that is all.

THE COURT: What sort of incidents are you talking about?

THE JUROR: In Leesburg where they raided the premises of the gentleman's business and confiscated stuff. That is the only thing I know.

THE COURT: Did you follow any paper as to the —

THE JUROR: (Interposing) No, sir.

THE COURT: Let me get my question out. Have you formed any opinion as to the guilt or innocence of these defendants of this charge?

THE JUROR: No, sir.

THE COURT: Can you decide the case based on what you hear here in the Court as opposed to what you have read or heard about this Leesburg incident?

THE JUROR: I can make it all independent, sir. That is what my job is.

THE COURT: You may have a seat, sir.

THE JUROR: Thank you, sir.

THE COURT: Next juror, please.

THE JUROR: Thank you, sir.

THE COURT: Next juror, please.

Yes, sir.

A JUROR: My name is Robert Schwengel, Your Honor. S-c-h.

THE COURT: Do you remember what it was you read or heard?

THE JUROR: There was an article yesterday in the Post, I believe, about the indictment and about starting the trial today. Also, some advertisements that were made by one of the defendants recently in the paper.

THE COURT: As a result of what you read or heard have you formed any opinion as to whether these defendants are guilty of the crime in this case?

THE JUROR: Not particularly, sir.

THE COURT: Even if not particularly —

THE JUROR: No.

THE COURT: In any way, sir?

THE JUROR: No, sir.

THE COURT: Do you think you could decide the case based on what you hear here in Court as opposed to anything you may have read about the case?

THE JUROR: I feel I could do my best, yes.

THE COURT: Do you think you could give these defendants just as fair a trial as you could if you hadn't read or heard anything about it?

THE JUROR: Yes.

THE COURT: All right. You may step down, sir.

Yes, sir?

A JUROR: Yes, Your Honor.

THE COURT: Your name, sir?

A JUROR: Matthew Zeikel, Z-e-i-k-e-l.

THE COURT: Do you remember what it was you read or heard?

THE JUROR: It was just what was run in the Washington Post, sir, some time ago.

THE COURT: Do you have any better recollection of what it was than that?

THE JUROR: No. I am sorry.

THE COURT: And when was it you think you may have read this?

THE JUROR: It was a couple months ago in the Washington Post.

THE COURT: Did it have anything to do with this case, do you think?

THE JUROR: Well, it was what Mr. LaRouche was accused of.

THE COURT: Did you follow up on it to see if you could learn any more about it?

THE JUROR: No.

THE COURT: Did it cause you to form any opinion as to his guilt or —

THE JUROR: (Interposing) No, sir.

THE COURT: —any of these defendants' guilt of the charges they are charged with today?

THE JUROR: I don't even recollect the other defendants' names.

THE COURT: Do you think you can decide this case based on what you hear here in Court as opposed to anything you might have read?

THE JUROR: I believe I can, yes, sir.

THE COURT: Can you give these defendants just as fair a trial as you could if you hadn't read anything?

THE JUROR: Yes, sir.

THE COURT: All right. You may step down, sir.

THE JUROR: Thank you.

THE COURT: Next juror, please.

Yes, sir?

A JUROR: Michael Pearse.

THE COURT: Mr. Pearse, what was it you read or heard?

THE JUROR: I read a couple stories in the Washington Post about the indictment, when the indictment was—I was on jury duty here and we were just during a break in jury service we looked at the newspaper. I read the story yesterday in the Washington Post.

THE COURT: Have you formed any opinion as to the guilt or innocence of these defendants?

THE JUROR: No.

THE COURT: Do you think you could decide the case based on what you hear here in Court as opposed to anything you may have read or heard before?

THE JUROR: I can decide it on the facts, Your Honor.

THE COURT: Do you think you can give these defendants just as fair a trial as you would if you had, as though you had not read anything?

THE JUROR: Yes, Your Honor.

THE COURT: All right. You may step down, sir.

A JUROR: Norman Horn.

THE COURT: Mr. Horn, what was it you read or heard?

THE JUROR: I read the article in yesterday's Washington Post.

THE COURT: As a result of reading that, did you form any opinion as to whether these defendants are guilty or innocent of the crimes they are charged with?

THE JUROR: No, Your Honor, I did not.

THE COURT: Have you ever read anything else about these defendants?

THE JUROR: Yes. About Mr. LaRouche when he moved his headquarters to Leesburg, there was some articles in the paper. I don't remember which one now. But I don't know that it had anything to do with this case.

THE COURT: Do you think you can decide this case based on what you hear here in Court as opposed to what you may have read or heard about it before?

THE JUROR: Yes, sir.

THE COURT: Do you think you can give these defendants just as fair a trial as you could if you had read nothing or heard nothing about the case before?

THE JUROR: Yes, I do.

THE COURT: All right. You may step down.

A JUROR: Edwina Brown.

THE COURT: Ms. Brown, what was it you read or heard?

THE JUROR: I read the Washington Post and the Richmond Times-Dispatch. My students and I discussed it in class just what the different charges of mail fraud and the other.

THE COURT: Did you and your students, or you alone, come to any conclusion as to the guilt or innocence of these defendants?

THE JUROR: I didn't exactly come to whether they were guilty or not, just as if they actually did do it, they should be prosecuted.

THE COURT: But did you make any decisions as to whether you thought they did do it?

THE JUROR: No, I didn't.

THE COURT: Did you follow up on what you read or heard?

THE JUROR: Yes, whenever it is in the Washington Post or the Richmond paper, I read what it says.

THE COURT: Are you sure you haven't formed any opinion as to their guilt in this case?

THE JUROR: That is real hard to say. I am sure you know we made some statement when I was talking with my students about it.

THE COURT: Do you have any reservations about whether you could give these defendants a fair trial?

THE JUROR: Yes, I really do.

THE COURT: I think you had better be excused.

THE JUROR: All right.

THE COURT: Yes.

A JUROR: Terri Perun.

THE COURT: Ms. Perun, what was it you read or heard?

THE JUROR: Just basically the headlines and news items on the television. Nothing specifically.

THE COURT: When was it? Do you remember?

THE JUROR: A while ago. I don't remember really now. I guess when it first came out last year or something. It is

very vague to me. But it is just basically headline news type of thing.

THE COURT: Did you form any opinion as to the guilt or innocence of these defendants?

THE JUROR: Not really, no.

THE COURT: Not really. At all?

THE JUROR: I don't think so.

THE COURT: Do you have any reservations about it?

THE JUROR: Not really, no.

THE COURT: All right. Do you think you could give these defendants just as fair a trial as though you had read or heard nothing before today?

THE JUROR: I believe so, yes. I think so.

THE COURT: Any uncertainty in your mind about it?

THE JUROR: Not really, no.

THE COURT: You keep qualifying it with "not really." And, "I don't really think so." I am not trying to talk you into something that you have any reservations about.

THE JUROR: No, I don't. I don't have any reservations.

THE COURT: All right. You may step down.

MR. MOFFITT: Your Honor, I move to strike her.

THE COURT: Let's get through this and then we'll go back on these.

Yes, sir.

A JUROR: Richard Callander. C-a-l-l-a-n-d-e-r.

THE COURT: Mr. Callendar, what did you read or hear?

THE JUROR: I work for the Department of the Treasury, U.S. Secret Service. I prepared demonstrative evidence in this case.

THE COURT: Did you?

THE JUROR: Yes.

THE COURT: You had better be excused.

THE JUROR: Thank you, sir.

MR. WEBSTER: Your Honor, can we find out whether he has talked to anybody else on this panel, if he hasn't affected this panel.

THE COURT: Mr. Callander, did you talk to anyone else on the panel about the case?

THE JUROR: No, sir.

THE COURT: Thank you.

Yes, sir?

A JUROR: Paul McDaniel.

THE COURT: Mr. McDaniel, what did you read or hear about the case?

THE JUROR: I have heard statements that Mr. LaRouche had claimed that he had had no personal income.

THE COURT: You read or heard that?

THE JUROR: Yes.

THE COURT: Did it cause you to form any opinion as to the guilt or innocence in this case?

THE JUROR: I have a hard time accepting that.

THE COURT: You feel it would affect your ability to be an impartial juror in the case?

THE JUROR: I believe it would, yes.

THE COURT: You will be excused.

MR. WEBSTER: What was his name?

THE COURT: McDaniel.

Yes?

A JUROR: Lenora Chapin. C-h-a-p-i-n.

THE COURT: Miss Chapin, what did you read or hear about the case?

THE JUROR: Of course, I have seen reports on TV, and there was an article in the Washington Post, but I did not read it. My husband said, "This could be the case that you are going to be involved in." And I said, "In that case I am not going to read it."

THE COURT: Have you read or heard anything else other than yesterday's article?

THE JUROR: No.

THE COURT: Have you formed any opinion as to the guilt or innocence of these defendants of the charges that they are here today for trial?

THE JUROR: No. Because I do not know the details involved.

THE COURT: Can you give these—I assume you have read or heard something about it or you wouldn't have held up your hand.

THE JUROR: That's true. I did hear it on TV news.

THE COURT: Anything that you heard caused you to form any opinion of this case?

THE JUROR: No.

THE COURT: Can you give these defendants just as fair a trial as you could if you had heard nothing on TV or elsewhere?

THE JUROR: Absolutely.

THE COURT: You may step down.

THE JUROR: Thanks.

THE COURT: Yes, sir?

A JUROR: Richard Bradie, Your Honor.

THE COURT: Mr. Bradie, what have you read or heard about the case?

THE JUROR: I read an article in the Washington Post, I believe it was yesterday. In terms of hearing anything formal or official or a lot of comment made, when I originally started jury duty by my peers in terms of this case possibly coming up, at which time I heard just what they were saying about what their beliefs were.

THE COURT: No other jurors?

THE JUROR: No. My fellows at work. My fellow workers.

THE COURT: Was reading the article or talking with your fellow jurors or anything else been such that would cause you to form any opinion as to the guilt or innocence of this defendant?

THE JUROR: I don't believe so, Your Honor. But I did have what might be considered not a confrontation but a meeting with some members of Mr. LaRouche's party at, it was either at a school. I am not really sure where it was. At a table for contributions. That caused me to form an opinion at that time.

THE COURT: Adverse to the group that you are being asked to contribute or in favor of them or —

THE JUROR: Adverse.

THE COURT: Would it affect your ability in this case to be impartial, do you think?

THE JUROR: I would like to say no, but I believe that it would make me have an adverse reaction.

THE COURT: All right. You will be excused.

Yes, sir?

A JUROR: Ralph Stickel, Your Honor, S-t-i-c-k-e-l.

THE COURT: Mr. Stickel, do you remember what you read or heard about it?

THE JUROR: To the best of my recollection, this is about a religious group or camp in Loudoun County, Virginia.

THE COURT: I am asking you what you have read or heard about it now.

THE JUROR: I think that's what it is. I am—I am not really sure, but I think that's—the name rings a bell.

THE COURT: Did you form any opinion as to whether they are guilty or innocent of the charges in this case as a result of what you may have heard or read?

THE JUROR: (Pause) If that's what it is, I don't feel too good about it.

THE COURT: If what is what it is?

THE JUROR: It seems to me there was a lot of controversy in Loudoun County about this group of people in a religious camp that they had set up and they had guns and stuff and keeping people in.

THE COURT: Did you form any opinion, do you think, that would affect your ability to be an impartial juror in this case?

THE JUROR: It might, yes, sir.

THE COURT: Then you will be excused.

THE JUROR: Okay, thank you.

THE COURT: Yes, sir?

A JUROR: Amin. A-m-i-n.

THE COURT: How do you spell it again?

THE JUROR: A-m-i-n.

THE COURT: All right. What did you read or hear about it?

THE JUROR: I think I read about a year or so I read about this, Mr. LaRouche camp and workers or people like that solicited some funds or loans and that is what I read in the press, that they had no intention of paying back. Other than that, I don't think I remember anything else.

THE COURT: Did you form any opinion as to whether they are guilty or not of the charges in this case?

THE JUROR: No, sir. I have little legal background. I am member of Bombay Bar. I would not have formed an opinion with regard to reading anything in the press or anything like that.

THE COURT: Is what you have read or heard been such as would affect your ability in this case to give them a fair trial?

THE JUROR: It won't affect it, Your Honor.

THE COURT: Can you decide this case based on what you hear here in Court as opposed to anything you may have heard?

THE JUROR: Yes, Your Honor, I can decide what I hear here.

THE COURT: All right. You may step down, sir.

Yes, sir?

A JUROR: My name is Dexter Anstrom, A-n-s-t-r-o-m.

THE COURT: Mr. Anstrom, what have you read or heard about the case?

THE JUROR: I have been substantially involved in the National Democratic politics in the last decade. I have read strangely about this case and have seen Mr. LaRouche politically in action for the last decade as well as reading this case.

THE COURT: Have you formed any opinion as to his guilt or innocence of the crimes with which he is charged in this case.

THE JUROR: I think I can honestly say I have not formed any opinion about this case, although I do have serious aversion to his brand and style of politics.

THE COURT: Would that aversion carry over so that it would affect your ability to be an impartial juror in this case?

THE JUROR: I have thought about that, and I think I could do this in an impartial manner.

THE COURT: Do you have any reservations about that?

THE JUROR: I have some reservations, not a major one, but I have some reservations.

THE COURT: But you do have reservations?

THE JUROR: I do.

THE COURT: I think you had better be excused.

THE JUROR: Thank you.

THE COURT: Yes, ma'am?

A JUROR: Johnson, Gwendolyn.

THE COURT: Miss Johnson.

THE JUROR: Yes?

THE COURT: What have you read or heard about that?

THE JUROR: An article as recent as yesterday in the Washington Post on the pending trial.

THE COURT: Is that the only article you remember reading?

THE JUROR: That's the most current, yes.

THE COURT: That is what?

THE JUROR: The most current, yes.

THE COURT: Have you read other things, though?

THE JUROR: No. I have turned down literature that has been presented where I work at the Pentagon on the LaRouche family or his followers.

THE COURT: Has turning down that literature or what you have read in the paper or otherwise been such that it would cause you to form any opinion in this case?

THE JUROR: I think I have some opinions of Mr. LaRouche that give me some reservations that I could —

THE COURT: You have some reservations about whether you could be impartial?

THE JUROR: Yes.

THE COURT: Then you will be excused, Miss Johnson.

Yes?

A JUROR: Catherine Wood

THE COURT: Mrs. Wood, what have you read or heard about the case?

THE JUROR: I live in Haymarket, which is the next town over, and the local paper, the Journal Messenger ran a series of articles about the LaRouche followers, the estate in Leesburg, versus the local people in Leesburg, plus what I have read in the Post.

THE COURT: Have you formed any opinion as to whether he is guilty of the charges in this case?

THE JUROR: I don't think so. It's hard to —

THE COURT: Do you have any reservations about it?

THE JUROR: Maybe.

THE COURT: Of whether you could be impartial?

THE JUROR: I can try, Your Honor.

THE COURT: That's —

THE JUROR: That's not good enough?

THE COURT: I would expect you to try, but I want to know if you have any reservations.

THE JUROR: I have reservations.

THE COURT: Then you will be excused.

Yes?

A JUROR: Joan Beauch.

THE COURT: Ms. Beauch?

THE JUROR: Right.

THE COURT: What have you read or heard about the case?

THE JUROR: The only thing I have heard is that he is charged with income tax evasion and mail fraud; and I haven't followed the case closely.

THE COURT: Do you remember what it was you read or heard?

THE JUROR: Just that he was charged with this.

THE COURT: How recently did you read this?

THE JUROR: I heard it yesterday on the radio.

THE COURT: Is what you have read or heard been such as to cause you to form any opinion as to their guilt?

THE JUROR: Not at this point, no.

THE COURT: This is the point that I want to know about.

THE JUROR: No, Your Honor.

THE COURT: Can you give—can you decide this case based on what you hear here in Court as opposed to anything you may have read or heard about it?

THE JUROR: I feel that I could.

THE COURT: Do you have any reservations about that?

THE JUROR: No.

THE COURT: Can you give these defendants just as fair a trial as you would if you hadn't read or heard anything about it?

THE JUROR: Yes.

THE COURT: All right. You may step down.

Yes, sir?

A JUROR: Andrew Mitchell.

THE COURT: Mr. Mitchell, what have you read or heard about the case?

THE JUROR: I have read pretty much just what the popular press has said about it. I work for the Justice Department.

So I see clippings as they come through, so I have read those as they come through. That's all other than pretty much newspaper-type articles and having lived in this area for a while, Mr. LaRouche—that's probably the only person that I am familiar with is Mr. LaRouche. Most of the other names don't make a recognition to me. It appears to me that he is a fairly well-known person in this area. I certainly have—recognize his name.

THE COURT: Have you formed any opinion as to the guilt or innocence of Mr. LaRouche or any of the others of the charges in this case?

THE JUROR: No, sir.

THE COURT: Can you decide this case based on what you hear here in Court as opposed to anything you might have read or heard before now?

THE JUROR: I believe I could, yes, sir.

THE COURT: You say you believe you could. Do you have any reservations about that?

THE JUROR: No. I mean I honestly feel I could. I don't know what's going to be presented, so I am having, until that point I couldn't tell whether I would be objective or not.

THE COURT: After you have heard the evidence, that is different. But I am talking about now do you have any reservations about whether you can give these defendants just as fair a trial as you could if you hadn't read or heard anything about it?

THE JUROR: No, sir.

THE COURT: Are you sure you can?

THE JUROR: Yes, sir.

THE COURT: All right. You may step down.

Anyone else?

How many jurors —

THE CLERK: We have stricken 42 so far out of 75. We have 33 left.

THE COURT: Now as to those I have inquired of, you wanted to be heard on one particular one, Mr. Moffitt?

MR. MOFFITT: Mrs. Perun, the lady who kept saying really to your questions. I am not real sure that she has, that she was not led into saying what she thought would get her on the jury. I don't think she really answered questions. She said not really to the point where you questioned her on her not really. I would ask she be excused.

THE COURT: I think her answers are probably all right, but I am a little concerned, too, about the qualifications she put on some of her answers. I will excuse Ms. Perun.

MR. GETTINGS: Your Honor, can we talk about the last gentleman? Certainly his answers are okay, but an employee at the Justice Department, I would think would pretty much be —

THE COURT: That's another issue. I am going to ask these jurors whether any of them are connected with any law enforcement agency of any type whatsoever. And we will see what comes out. I don't think he is going to say any more than he has said already. But I don't think at this point I have any basis to excuse him for cause.

MR. ANDERSON: The first juror, Mr. Kutzlo or some such pronounciation, indicated that they were from Leesburg and was aware of the press coverage in the Leesburg area, which has been extensive and antagonistic to Mr. LaRouche, as did another juror—We filed a motion concerning —

THE COURT: I am not going to strike everybody from Leesburg or Loudoun, Mr. Anderson.

MR. ANDERSON: It's the gentleman who you did strike who was from Leesburg indicated that the controversy was presented in the local newspapers, the Loudoun Times Mirror, I think that's the name of it, was presented as a citizens of Loudoun County versus LaRouche issue. The good citizens of Loudoun County versus the bad people associated with LaRouche.

THE COURT: I am not going to excuse him, Mr. Anderson.

MR. MOFFITT: Your Honor, there is one concern. Most of the things that were mentioned in yesterday's news-paper was the fact that there were prior charges and the Boston case. And there is a concern amongst defense counsel that people who read that article be stricken.

THE COURT: I am not going to strike them.

All right.

MR. WEBSTER: Your Honor, one additional thing: first I would like to register an objection to the entire panel, as having been so badly infected by virtue of the initial comment of those whom you did excuse, who admitted they knew about this case and formed an opinion against them and so forth. Secondly, I did not hear the objection, I'm sorry, but I had a gun go off in my ear when I was in the Navy, but I didn't hear the initial objection that was made by counsel.

THE COURT: Mr. Kutzlo.

MR. WEBSTER: No, when we first came to the Bench. Was there an objection?

THE COURT: Mr. Moffitt made the same objection you just made as to the entire panel being infected by adverse, who responded affirmatively to my inquiry about adverse —

MR. WEBSTER: I am sorry for repeating it.

THE COURT: That's all right.

MR. WEBSTER: But I didn't the other objections.

THE COURT: I will take it all objections by any defendants are adopted by all defendants unless counsel wants to disassociate himself for any particular reasons, so that ought to as far as your record is concerned, you don't have to have seven people jumping up.

MR. MOFFITT: While we are at the Bench, Your Honor you have a juror on there, Richard Cole. He works for Bruner Kane, the accounting firm. They do the accounting for my law firm.

THE COURT: Is he a cousin of yours?

MR. MOFFITT: No. He works for my accounting firm, Your Honor. That's probably closer than a cousin.

THE COURT: He knows how much money you make?

MR. MOFFITT: Yes.

THE COURT: We'll ask him that under oath.

MR. MOFFITT: Several grand jurors might be interested.

THE COURT: All right, gentlemen.

(Whereupon, the conference at the Bench was concluded, and the following proceedings were held:)

THE COURT: I read off earlier the names of the defense counsel in the case. I wanted to inquire of you whether any of you know them or are represented by them. You may have forgotten who I read off. They are Mr. Kent Robinson, Mr. John Markham and Mr. Mark Rasch for the Government; and I am going to read off who I have here and then you gentlemen supplement.

Mr. Odin Anderson, Mr. Robert Rossi and Mr. Frederick Sinclair for Mr. LaRouche; Mr. Brian Gettings for Mr. Wertz;

Mr. Kenly Webster and Mr. Getty Wainrick (phonetic) and Mr. Thomas Hill for the defendant Mr. Spannaus; Mr. James C. Clark for the defendant Mr. Billington; Mr. William Moffitt and Ms. Lisa Kemler for the defendant Dennis Small; Mr. Michael Reilly and Mr. Daniel Alcorn for the defendant Mr. Greenberg; and Mr. Edwin Williams for the defendant Ms. Rubinstein.

Are there any members of the jury panel who are acquainted with any of those counsel or represented by them?

Have you been connected with or members of or had business dealings with any of the following organizations which may be mentioned in the case: the National Caucus of Labor Consultants; Campaigner Publications, Incorporated; Caucus Distributors, Incorporated; Fusion Energy Foundation, Incorporated; New Benjamin Franklin House Publishing Company; Publications and General Management Company; Publication Equities, Incorporated; Leesburg Security Fund; Loudoun County Land Trust. Any members —

MR. MARKHAM: Your Honor, may we add one to that list: National Caucus of Labor Committees.

THE COURT: I asked about the National Caucus of Labor Consultants. I will add to that the National Caucus of Labor Committees. Have any of you had any business dealings with or are you members or connected in any way with any of those organizations?

There are certain persons who are alleged, victims in the case, in the indictment. I am going to read off their names and ask you if you are acquainted with any of these people: Herschel Zirger, Z-i-r-g-e-r; Helen Murray; Arthur Hawkes; Richard McDowell; David Kalen, K-a-l-e-n; Paul Wittke, W-i-t-t-k-e; Linden Harmon; Walter Wright; Edna Calenvidge (phonetic), C. Rudel (phonetic); Elizabeth Sexton or Mrs. Thomas S. Sexton; Lita Witt; Dorothy Powers;—Alan or Clifford Rither, R-i-t-h-e-r; Audry Carter; Cecilia Landegger, L-

a-n-d-e-g-g-e-r; Garry, G-a-r-r-y Corbin; Martha Van Sickle; Goodwill Post; Max A. Harrell.

Any of you know any of those persons?

Have you or any member of your immediate family ever worked for a law enforcement agency or been connected with a law enforcement agency of any type whatsoever?

Will you stand and give your name, please.

A JUROR: I am Pat Connor, Your Honor. I am a secretary with the Drug Enforcement Administration.

THE COURT: Would that affect your ability to be an impartial juror in this case in your opinion?

THE JUROR: No, sir.

THE COURT: Thank you.

Yes, sir?

A JUROR: Matthew Zeikel. My brother works for the United States Department of State, Security.

THE COURT: Mr. Zeikel, would that affect your ability to be an impartial juror in this case in your opinion?

THE JUROR: No, Your Honor.

THE COURT: Yes.

A JUROR: Regeanne Woodworth. My brother-in-law works for the State Police Office in New Mexico.

THE COURT: Would that affect your ability to be an impartial juror in the case, in your opinion?

THE JUROR: No.

THE COURT: Thank you.

Yes, sir.

A JUROR: Andy Mitchell. I currently work for the Justice Department, Office of Justice Program.

THE COURT: We inquired of you at the Bench. Would that affect your ability to be an impartial juror in this case?

THE JUROR: I don't believe so, Your Honor.

THE COURT: Even though there are Department of Justice persons on this side of the room, are you sure you could be impartial in the matter?

THE JUROR: Yes.

THE COURT: Thank you.

Yes, sir?

A JUROR: My name is John Usrey. I am a repairman with the FBI.

THE COURT: Would that affect your ability to be an impartial juror in this case, in your opinion?

THE JUROR: I don't think so.

THE COURT: You say you don't think so. Do you have any reservations about it?

THE JUROR: No, sir.

THE COURT: Yes?

A JUROR: May name is Lenora Chapin. My husband is a former Special Agent with the FBI, retired.

THE COURT: Would that affect your ability to be an impartial juror in the case, in your opinion?

THE JUROR: No.

THE COURT: Thank you.

Yes?

A JUROR: Dennis Schabacker. I am with the Internal Revenue Service.

THE COURT: This case contains a tax count. You are aware of that?

THE JUROR: Yes. I am involved with the Bureau of —

THE COURT: I can't hear you.

THE JUROR: I am involved with computer procurements and services.

THE COURT: All right. Would that affect your ability to be an impartial juror in this case?

THE JUROR: No.

THE COURT: Thank you.

Yes, sir.

A JUROR: Theodore Kutzlo. I am also with the Internal Revenue Service.

THE COURT: What branch of —

THE JUROR: I am in the computer service area.

THE COURT: Bearing in mind that this indictment has a tax count, would that affect your ability to be an impartial juror in the case, in your opinion?

THE JUROR: No, sir.

THE COURT: Have you acted as an agent?

THE JUROR: As an internal auditor, sir.

THE COURT: Thank you.

MR. WILLIAMS: Your Honor, I didn't get his name.

THE JUROR: Kutzlo. K-u-t-z-l-o.

MR. ROBINSON: Your Honor, one of the Government witnesses will be an IRS computer specialist. Perhaps it would be appropriate to inquire whether the last two gentlemen know that person. His name is Harry Chusid, and he works in the national office in computer matters.

THE COURT: Do either of you know that gentleman?

THE JUROR: No.

THE JUROR: No.

MR. ROBINSON: Thank you, Your Honor.

THE COURT: Would his testifying for the Government if that is what he testifies affect your ability to give these defendants a fair trial?

THE JUROR: No.

THE JUROR: No.

THE COURT: All right.

Yes, sir?

A JUROR: My name is Michael Pearse. My uncle is a former Internal Revenue Service agent.

THE COURT: All right.

Would that affect your ability to be an impartial juror in the case?

THE JUROR: No, Your Honor.

THE COURT: Thank you.

Anyone else?

A JUROR: Yes, sir.

Edward Young. I am with the Central Intelligence Agency. I have extensive dealings with the DEA and the FBI.

THE COURT: Would that affect your ability to be an impartial juror in this case?

THE JUROR: Yes, sir, I believe it would.

THE COURT: It would?

THE JUROR: Yes, sir.

THE COURT: Your name again, please?

THE JUROR: Edward Young.

THE COURT: Mr. Young, you will be excused.

Yes, sir.

A JUROR: This may not be germane. I am a certified public accountant involved in taxes quite a bit.

THE COURT: I am going to get to that in a minute, but I might as well ask you now that you are on your feet. Is that going to affect your ability to be an impartial juror in this case, in your opinion?

THE JUROR: No, Your Honor.

MR. ANDERSON: His name, Your Honor?

THE COURT: Your name again, please, sir?

THE JUROR: Norman Horn.

THE COURT: Thank you.

A JUROR: Your Honor, I forgot to mention I do have an uncle who works for the Central Intelligence Agency.

THE COURT: Would that affect your ability any?

THE JUROR: No, Your Honor.

THE COURT: All right.

Have you or any member of your immediate family ever been the victim of a crime or participated in a criminal case or in any other capacity?

(No response)

Would any of you give more credence to the statement of a law enforcement officer than that of another person merely because that person is a law enforcement officer?

Including all of the questions that I have asked, do any of you harbor any resentment or feeling or prejudice against these defendants which would in any way deny them a fair and impartial trial, even though they might not have technically been within the questions I have asked? Are there any persons who harbor any form of feeling against any of these defendants that would in any way deny them a fair and impartial trial?

(No response)

THE COURT: Do you have any belief or opinion that the charges against these defendants are unique in the sense that they should be pursued with extraordinary vigor, that they shouldn't constitute an offense, or that they might carry penalties which you would consider improper?

Do any of you know of any reason whatsoever why you cannot sit with absolute impartiality to both the Government and the defendants as trial jurors in the case?

(No response)

Gentlemen, I think I have asked enough questions to insure an impartial panel.

MR. ANDERSON: May we approach?

THE COURT: All right.

(Whereupon, a conference was held at the Bench with Court and counsel, out of hearing of the jury, and reported as follows:)

THE COURT: All right. Shoot.

MR. MOFFITT: Too many marshals, Your Honor.

I am not going to shoot.

With regard to Ms. Chapin, Mr. Mitchell, I believe Mr. Usrey—I'm not sure of the name—Mr. Schabacker and Mr. Kutzlo, I move to strike them for the following reasons: with respect to Mr. Usrey and Ms. Chapin, Ms. Chapin's husband is a former FBI agent; Mr. Usrey is with the FBI at the present time.

Your Honor, I know what your motion in limine says with regard to getting into certain things regarding the FBI in the opening statement, but I would say to you that pieces of evidence clearly discuss the FBI, clearly discuss harassment by the FBI that the Government has submitted as exhibits.

THE COURT: Which one is that? What is the gentleman's name?

MR. GETTINGS: Ms. Chapin —

THE COURT: Yes, but I am talking about —

MR. WILLIAMS: There were two IRS agents.

MR. MOFFITT: I am not talking about them. I am talking about the FBI.

THE COURT: The FBI employees.

MR. GETTINGS: He is different from the Justice. This one is a repairman.

THE COURT: The repairman?

MR. GETTINGS: That's right.

THE COURT: I am not going to strike him.

MR. GETTINGS: I would like to make a point on that if I could.

THE COURT: Briefly.

MR. GETTINGS: It goes to the agency, Your Honor. It's going to come out in the trial that the interested agencies are the FBI, the IRS and the Justice Department. They are the investigators.

THE COURT: They are in most criminal cases.

MR. GETTINGS: No, we are not talking about DEA now We are not talking about Secret Service and the Postal Service. Those are the specific agencies.

THE COURT: I am not going to strike him.

MR. GETTINGS: Those people—all right. Could you ask him if whether or not if an agent from those agencies testified, they would give their testimony more credence than they would any other agent?

THE COURT: I have already asked that question. I am not going to strike them for cause.

MR. MOFFITT: Would you consider striking Ms. Chapin, whose husband is a former FBI agent?

THE COURT: I have considered it. I am not going to strike her.

MR. MOFFITT: I also move to strike Mr. Schabacker and Mr. Kutzlo as members of the IRS in a case that would be dealing with IRS, I am concerned, I don't remember Mr. LaRouche in the facts case, but I am concerned about the spillover. I have got a jury and they are clearly from the same section as somebody who is going to testify.

MR. ROBINSON: I think they said they weren't from the same section.

MR. MOFFITT: They don't know him.

MR. ROBINSON: The mere fact they run computers for the IRS, Your Honor, doesn't make them more than two among hundreds of thousands of people. The IRS is one of the biggest bureaucracies in the Government. I don't see how we can —

THE COURT: You don't want that on the record, Mr. Robinson.

MR. ROBINSON: In terms of the number of people employed there, Your Honor, that's all I meant.

I don't see how we can exclude for cause everyone who is an employee of that agency, even if they have jobs totally unrelated to any sort of investigative function.

MR. MOFFITT: In some cases, if this was a drug case, or a robbery case, they certainly could sit, but this is a case that deals directly in part with that agency and what that agency does. I am very concerned to have them sitting on a jury like this.

MR. WILLIAMS: I want to add that in a search that is going to be coming in to evidence, the evidence of the search out in Leesburg in October of 1986, there were IRS agents involved in that. The affidavit in support of the search warrants indicate the IRS did a lot of investigation for that.

THE COURT: We have got plenty of jurors. I think that to possibly taint this panel with two Internal Revenue agents, I think technically, they could probably sit. But I am going to excuse them both.

MR. ANDERSON: Your Honor, one other point.

Mr. Horn, who is a certified public accountant, we formulated one of the questions that was submitted to Your Honor which asked for any expertise —

THE COURT: I planned to ask him and overlooked it. I am sorry. I will ask him.

MR. ANDERSON: My concern, Your Honor, since we are here now is with regard to Mr. Horn that anyone who brings this unique type of expertise and interpretation of the Internal Revenue Code is going to be making decisions based on extraneous material and not necessarily what they hear at trial. I think he would be in fact obviously it would give the jury, his opinions whatever they would be would drive the rest of the jurors. They would listen to him. I am the CPA. I know what the Internal Revenue Code says. You don't have to listen to what you heard in Court. You can hear it from me.

THE COURT: You run that risk with every juror. I am not going to strike him for cause. But I will inquire about whether they have any tax, not for cause but for jury information, and exercising your preemptory strikes.

If you all will give me a little opening here, I will ask them.

(Whereupon, the Court addressed the jury panel)

THE COURT: I did not ask and I intended to ask whether any of you have—Mr. Horn has already advised us, any tax background, or accounting background or training. Would you hold up your hands. Just stand and give me your name, sir.

A JUROR: Frank DeMarco.

THE COURT: Thank you.

Yes?

A JUROR: My husband is an accountant. Beauch.

THE COURT: All right. Ms. Beauch. Thank you.

Yes?

A JUROR: My undergraduate degree was majoring in accounting.

THE COURT: Thank you, sir.

A JUROR: Alicia Billker. I do bookkeeping and payroll.

THE COURT: I did not hear that.

THE JUROR: Bookkeeping and payroll for different companies.

THE COURT: What is your name again, please.

THE JUROR: Alicia Billker.

THE COURT: Thank you.

Yes?

A JUROR: I have a minor degree in business.

THE COURT: Your name, sir?

THE JUROR: Richard Bockes.

THE COURT: Thank you, Mr. Bockes.

Yes?

A JUROR: Pearse. I took courses in accounting in college. Michael Pearse.

THE COURT: All right. Thank you.

A JUROR: I have taken several accounting courses and I work in banking. My name is Reger.

THE COURT: Ms. Reger, thank you.

THE COURT: I find this panel to be free of exception, gentlemen.

How many have we got?

THE CLERK: You excused Schabacker and Chapin.

THE COURT: No. I excused Mr. Kutzlo and the other Internal Revenue agent.

THE CLERK: Schabacker and Kutzlo.

THE COURT: Yes.

THE CLERK: That leaves 29.

MR. WEBSTER: Could Your Honor inquire and make sure we have got all IRS people identified? As long as you are excusing the two, I would like to make sure that we are excusing all in that category.

THE COURT: I think I have included them.

Are there any other members or employees of the Internal Revenue Service or Agency other than these two gentlemen over on the left?

All right.

Okay, gentlemen. We can start. Make up a list of these 29. And we will start with the strikes.

MR. GETTINGS: I don't think we have ever settled on how many we have, Your Honor.

THE COURT: You have 10.

MR. GETTINGS: How about extras for the individual defendants.

THE COURT: No extras for individual defendants.

You can split 10.

MR. GETTINGS: 10 and 6?

THE COURT: Right.

MR. MOFFITT: Your Honor, would you note our exception to that?

MR. WEBSTER: Mine, also.

MR. WILLIAMS: Yes.

THE COURT: I take it every exception taken and every objection taken is joined in by everybody so you don't have to go through this.

MR. MARKHAM: Your Honor, after we complete the selection process, when will we be starting opening statements?

THE COURT: Right away.

MR. MARKHAM: In the event any of the gentlemen wish not to give an opening statement, could the Court direct them when they stand to say so not to repeat that they are not ready for trial? That is a matter for the Court. They have already said it twice. I don't think they should have said it again in front of the jury, Your Honor.

THE COURT: I think that's correct. I don't think that's a jury matter.

There is a motion in limine that the defendants filed. I will ask the Government not to mention that in their opening statement. That is Mr. LaRouche.

I will give the Clerk time to put together —

THE CLERK: I am ready.

MR. MOFFITT: Your Honor, I think we need some time to confer since I have got to exercise one and a percentage of a strike.

THE COURT: You will have some time.

MR. ANDERSON: I would like to discuss the jurors remaining with my client, Your Honor.

THE COURT: All right.

MR. WEBSTER: Your Honor, the Government has put in a trial brief which raises certain questions of admissibility.

THE COURT: We'll pass on them when it's offered.

MR. WEBSTER: I would like to have the opportunity to object to their referring in opening statement, in their opening statement to certain matters relating to my client. May I put that on the record at this time?

THE COURT: Any of those questionably admissible things don't mention in your opening statement.

MR. ROBINSON: I don't think I am planning to, Judge.

MR. WEBSTER: One of the things is my client's notebook. I think that's highly controversial.

THE COURT: Not anymore it's not.

MR. WEBSTER: I would like to at least put my objection, before it occurs, on the record, Your Honor.

THE COURT: You have an objection to even the use of it.

MR. WEBSTER: We challenge the way in which they were obtained in the search and seizure but there were some specific statements that the Government wants to refer to. I don't know which one of them was going to do it. Among other things one of those statements is extremely ambiguous and by mentioning it, they essentially compel my client to take the stand to explain what it is.

THE COURT: I don't think so. We are not going to have a lot of these sort of motions every five minutes, Mr. Webster. If you have an objection, raise it at the time. I will rule on it at the time. I am not going to stop them from mentioning those notebooks in opening statement. I will take a short recess, if you need some time to go over your strikes. All right.

MR. ANDERSON: Your Honor, is it possible that — apparently there is no witness room or other conference room available to counsel. I discussed it with the Marshal this morning but he was under the opinion that, of the opinion that it would be unavailable because of some other Court in session.

THE COURT: We just don't have enough rooms in this building to accommodate you. The courtroom will be open, and a Marshal stationed here, not within hearing, during recesses and any other time. You can use that. We just don't have a room available.

MR. ANDERSON: Your Honor, I don't know the circumstances of the other defendants, the attorneys, but I have difficulty. I cannot take LaRouche out at lunch time. I will keep him in the courtroom. Can I get permission to get sandwiches?

THE COURT: I am going to treat him like any other defendant, Mr. Anderson.

MR. ANDERSON: That means he won't get to eat lunch.

THE COURT: That's your problem.

THE CLERK: You will excuse Mr. Kutzlo and Schabacker first?

THE COURT: Yes. Then the remaining 29 jurors will be put in the jury room.

(Whereupon, the conference at the Bench was concluded, and the following proceedings were held:)

THE CLERK: Mr. Kutzlo and Mr. Schabacker will be excused.

THE COURT: The remaining unexcused jurors will go into the jury room. I am going to tell you now and I am afraid I am going to tell you so many times that you are going to

be bored stiff with it, that during this and any other recess or adjournment, you are not to discuss the case with each other or with anybody else allow it to be discussed in your presence. You should not form or express any opinion on the outcome of the case until you have heard all of the evidence and received the charge of the Court.

But I am going to be telling you that at least once a day during the trial of the case. It's boring, but it's important.

Court will take a short recess. The jury will go to the jury room, and then we will come back and we will take your party's preemptory strikes.

We'll take a short recess.

(Whereupon, at 11:02 a.m., a short recess was taken.)

THE COURT: The Clerk will call the first 12 jurors by lot.

THE CLERK: Ladies and gentlemen of the jury, as I call your name, will you please come forward and have a seat in the jury box: Juror No. 7, Richard Bockes; Juror No. 51, Stephanie Reger; Juror No. 57, Robert Schwengel; Juror No. 70, Maxine Williams; Juror No. 21, Charles Foreman; Juror No. 5, Joan Beauch; Juror No. 75, Matthew Zeikel; Juror No. 79, Barry Basham; Juror No. 23, Gregory Gordon; Juror No. 15, Francis DeMarco; Juror No. 6, Laura Bishop; Juror No. 47, William Ortiz-Pagen.

THE COURT: Counsel approach the Bench.

(Whereupon, a conference was held at the Bench with Court and counsel, out of hearing of the jury, and reported as follows:)

MR. MOFFITT: Your Honor, for the record speaking for the entire defense team, it was impossible for us to exercise partial strikes, so over everyone's objection, Mr. Gettings, we figured that the way to do this was one person exercising the strikes. Mr. Gettings was delegated. We want the record

to be clear this was not because we want to do this but it was the most efficient way to do it.

THE COURT: You picked the most efficient person, is that it?

MR. GETTINGS: No, no, Your Honor. That certainly isn't so.

THE COURT: I understand.

Mr. Robinson, is the Government content with that group?

MR. ROBINSON: I have one I would like to strike, Judge.

THE COURT: Just tell me who it is.

MR. ROBINSON: No. 3 on the board.

THE COURT: Juror No. 57?

MR. ROBINSON: Yes.

THE COURT: Just tell me who you want off, and I will take them off.

MR. GETTINGS: No. 21.

MR. WILLIAMS: Would you say the names.

MR. GETTINGS: 21.

THE COURT: Foreman.

MR. GETTINGS: No. 75; No. 57 —

MR. ROBINSON: We took 57.

MR. GETTINGS: I'm sorry.

THE COURT: The Government took your strike.

MR. GETTINGS: No. 7.

How many have we used?

THE COURT: You have used three.

MR. GETTINGS: 15.

THE COURT: DeMarco?

MR. GETTINGS: Right. 5. Beauch. I think that's it. Could I have one moment, Your Honor?

THE COURT: Didn't you confer with them?

MR. GETTINGS: I have done a lot of conferring. I would like one more minute.

THE COURT: All right.

MR. GETTINGS: All right. We have six left? Five left?

THE COURT: You have five left.

You can stay right here, gentlemen.

THE CLERK: The following jurors please return to your seats in the courtroom: Robert Schwengel, Joan Beauch, Francis DeMarco, Richard Bockes, Charles Foreman, Matthew Zeikel.

The following jurors please come forward and have a seat in the jury box: Juror No. 27, Buster Horton; Juror No. 41, Andrew Mitchell; Juror No. 81, Alicia Billker; Juror No. 26, Norman Horn; Juror No. 12, Pat Conner; Juror No. 11, Lenora Chapin.

MR. ROBINSON: No strikes.

THE COURT: The Government has taken no strikes.

MR. GETTINGS: 41, Mitchell; 11, Chapin; 26, Horn; we only have two left. May I have a moment, Your Honor?

THE COURT: Yes.

MR. GETTINGS: Okay, Your Honor.

You saw democracy at work right there.

THE CLERK: The following jurors please return to your seats in the courtroom: Norman Horn, Lenora Chapin, Andrew Mitchell.

The following jurors please come forward and have a seat in the jury box: Juror No. 73, Regeanne Woodworth; Juror No. 54, Christine Rudolf; Juror No. 16, Robert Drews.

MR. ROBINSON: No strikes.

THE COURT: The Government has no strikes, Mr. Gettings.

MR. GETTINGS: 16, Drews.

We have two left?

THE COURT: One left.

MR. GETTINGS: One juror left?

THE COURT: One strike left.

MR. GETTINGS: All right.

THE CLERK: Robert Drews, will you please return to your seat in the courtroom.

Juror No. 77, Pramond Amin.

THE COURT: The defendants have used nine strikes.

THE CLERK: Yes.

MR. MOFFITT: Yes, sir.

THE COURT: That's what I thought.

MR. ROBINSON: We'll strike him, Your Honor.

THE CLERK: Pramond Amin, will you please return to your seat in the courtroom.

Juror No. 78, Vicki Araujo.

MR. ROBINSON: All right.

MR. GETTINGS: Is the Government passing?

THE COURT: Yes.

MR. GETTINGS: We pass, Your Honor.

THE COURT: All right.

I suggest we have four alternates. We could have more. But I would think four would be adequate. I am not wedded to that. I will have to get a new panel down to select those alternates and go through the same stuff we went through before. I don't have enough—I don't think I have got enough — how many strikes did the Government take?

MR. ROBINSON: I only took two, Judge.

THE COURT: I have got four jurors left. The Government took three strikes?

MR. ROBINSON: Two.

MR. GETTINGS: Three?

THE COURT: Just two.

How many jurors have we got left?

THE CLERK: Five.

MR. ROBINSON: Why don't we each get one strike and they only use three?

THE COURT: Well, three is probably enough.

MR. REILLY: This happened once before, Your Honor, as a shortage of alternates —

THE COURT: You are not going to have any five-month trial here.

MR. REILLY: I know.

THE COURT: I would think three would be enough. Suppose we call three and each side will be entitled to one strike. The first one called, who is not stricken, will be Alternate No. 1, and then we'll proceed in that way. And then we will replace the juror, any incapacitated juror in that order, first Alternate No. 1 and then Alternate No. 2 and then Alternate No. 3.

MR. GETTINGS: Are we going to have three alternates?

THE COURT: We'll have three alternates. We will call three. Each side will be entitled to one strike on the alternates.

Is that enough?

MR. GETTINGS: I don't know, Your Honor. I have a problem, because that would mean that of the remaining two, that would be it. We wouldn't have a chance —

THE COURT: Actually I think if you take three alternates, you have to have two strikes a side.

MR. GETTINGS: That's right.

THE COURT: Maybe we had better get that other panel down. I have got more jurors.

MR. ROBINSON: Judge, we may not take any strikes from the five remaining. I would hate to go to all of the trouble bringing another panel down here.

THE COURT: If the Government will give up its strikes, I don't have any problem. You know who they are right now.

MR. MARKHAM: Could we ask the Court for their names?

THE COURT: They are the remaining ones of the 28 we just had.

THE CLERK: Melville, Smith, Nixon, Usrey and Pearse.

MR. GETTINGS: How many strikes do we get?

THE COURT: Two.

MR. ROBINSON: They are fine.

THE COURT: All right. Call three, and you will have two strikes.

MR. GETTINGS: Can we pow-wow on this? We have got a problem.

THE COURT: Sure.

MR. GETTINGS: May we have five mintues, ten minutes, seven-and-a-half mintues?

THE CLERK: No. 45, Vivian Nixon.

THE COURT: Let's call the three people These are the same people you have already pow-wowed on.

THE CLERK: Juror No. 64, John Usrey.

THE COURT: What was the first one, Mrs. Poole?

THE CLERK: No. 45, and No. 64.

THE COURT: Who is the next one? I'm sorry.

THE CLERK: No. 64.

THE COURT: Mr. Gettings is talking to me so much, I missed the name.

THE CLERK: Juror No. 40, Charles Melville.

THE COURT: You have two strikes.

MR. GETTINGS: Right. What I am inquiring as to is in what order would they sit.

THE COURT: Alternate No. 1, if he is not stricken at this time would be the first one to sit. If Alternate No. 1 is stricken, then Alternate No. 2 would become Alternate No.

1. The first will be in the order seated. And they are seated one, two and three.

MR. GETTINGS: I am wondering, is the order in which they were called—that's the same order?

THE COURT: Alternate No. 1, 2 and 3.

MR. GETTINGS: Smith, Nixon, Usrey and Pearse?

MR. MOFFITT: No. Nixon, Usrey and Pearse—Nixon is one, Usrey is two, and Pearse is three.

MR. GETTINGS: I see.

THE COURT: It's Pearse, Melville—Melville hasn't been called yet, I don't think.

That's Nixon, Usrey and Melville.

MR. MOFFITT: The Government has waived their strikes. We get two.

MR. GETTINGS: What is the order between Pearse and Smith, Your Honor?

THE COURT: Pearse hasn't been called and neither has Smith.

MR. REILLY: Those are the two left.

MR. GETTINGS: We don't know which one comes next?

THE COURT: Unless you strike two now and then both of them will come next.

MR. GETTINGS: No. I am looking ahead to when a member of the jury becomes ill or whatever and I want to know who goes in first?

THE COURT: All right. If one of them became ill now, we would put Ms. Nixon on. If you strike Nixon, then Usrey becomes the first one on the list. If you strike Usrey and Nixon, then Melville becomes No. 1.

MR. GETTINGS: Right. Okay.

Now, what would happen between Pearse and Smith? That comes out of the —

THE COURT: Comes out of the box.

MR. GETTINGS: All right.

THE COURT: Which one?

MR. GETTINGS: This one.

THE COURT: Usrey. Now that makes Nixon No. 1 and Melville No. 2.

Call them.

THE CLERK: John Usrey, will you please return to your seat in the courtroom.

Juror No. 59, Willard Smith.

THE COURT: Now, he as it now stands is Alternate No. 3.

MR. GETTINGS: We don't have any problem with him.

MR. MOFFITT: That's it.

THE COURT: All right.

MR. MOFFITT: Yes.

(Whereupon, the conference at the Bench was concluded, and the following proceedings were held:)

THE CLERK: Those jurors not selected are excused until your next Court date.

THE CLERK: Would the defendants please stand.

Would the jurors please stand and raise your right hands.

(Whereupon, the jury panel was duly sworn by the Clerk.)

* * * *

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,	)	
	)	
V.	)	Cr. No. 88-00243-A
	)	
LYNDON H. LAROUCHE, JR., et al.	)	

MEMORANDUM OF DEFENDANTS LYNDON LAROUCHE ET AL. IN SUPPORT OF THEIR MOTION FOR DISCLOSURE OF EXCULPATORY MATERIAL

INTRODUCTION

By the very nature of the Indictment in this case, the government has defined a broad range of information as exculpatory.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to the punishment, irrespective of the good faith of the prosecution." *Id.* at 37. This holding gave rise to the *Brady* rule which permits criminal defendants to receive all exculpatory material and/or material favorable to their defense that is in the government's possession.[1]

[1] Implicit in the duty to disclose under Brady is the concept that the prosecution must have notice of its possession of evidence which is favorable to the defendant. Significantly, knowledge by one agency of the government will be imputed to another. *See Moore's Federal Practice*, Vol.

Although there has been much learned debate concerning the reach of Brady, most commentators agree that the precise scope of discoverable material must be determined on a case-by-case basis. Wright, *Federal Practice and Procedure*,Criminal Sec. 254 p. 74 n.41 (2d Ed. 1982) and cases cited therein.

The Indictment charges two separate conspiracies (Counts 1 and 13), plus twelve substantive counts of mail fraud. Count 1 charges all defendants with a conspiracy to devise a scheme or artifice to defraud. Count 13 charges that defendant LaRouche, in combination with various unnamed and unindicted co-conspirators, conspired to defraud the United States with respect to the ascertainment and collection of his personal income taxes.

Behind the two charged conspiracies appears to lurk a larger, global conspiracy: "The Organization," specified as the National Caucus of Labor Committees (NCLC). That the government regards the NCLC as the larger, conspiratorial enterprise behind the two charged conspiracies is evident from the overlap between all the Counts of the Indictment.

Paragraphs 1 through 10 of Count 1—the entirety of the section captioned 'THE ORGANIZATION' and the first part of the section entitled 'FUNDRAISING OPERATIONS'—describe the NCLC itself as a criminal enterprise totally and completely controlled by defendant LaRouche. The NCLC is portrayed as a hierarchical, rigidly-structured enterprise, which exists for the sole purpose of promoting and supporting

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8. P 16.06[1] (2d Ed. 1988). Thus, the United States Attorney's Office for the Eastern District of Virginia will be held to know of all Brady material in the custody of all the government authorities involved in the investigation of this case. *See United States v. Bryant*, 439 F.2d 642, 650 (D.C. Cir. 1981); *United States v. Deutsch*, 475 F.2d 55 (5th Cir. 1973); *Emmett v. Ricketts*, 397 F. Supp. 1025 (N.D. Ga. 1977).

Lyndon H. LaRouche, and which is controlled and directed in all relevant aspects by LaRouche. This theory of the NCLC as the global conspiracy was precisely the theory used by the prosecution in the Boston case which ended in a mistrial last May. This portrayal of the NCLC provides the context for defining various actions of the defendants and others, as either overt acts of the charged conspiracies, or as substantive crimes.

Given the government's theory of the NCLC as the global criminal enterprise, any information in the government's possession which tends to refute or contradict this theory is exculpatory within the meaning of *Brady*.

The extremely broad nature of the alleged loan fraud conspiracy (Count 1) also defines a range of information as exculpatory. This is exemplified by the accusation that statements made by the defendants as explaining why loans could not be repaid in a timely fashion, were in fact "lulling" statements. In specific, the Indictment charges that the following statement by defendant LaRouche was false, fictitious, and fraudulent:

> Any non-performance in loan repayment has been solely the result of wicked operations by adversaries of CDI, with no discretionary non-performance by CDI itself; there is no question, but that the loans would have been repaid in a timely fashion, but for the activities of my enemies.

Since the government has put this and similar statements at issue, the defendants are entitled to any information in the government's possession which would tend to show the truth of the above statements, or show that the defendants had a reasonable basis to believe the truth of the above statements.

Evidence of any harassment of defendants which interfered with fundraising, sales, or financial expansion, is excul-

patory in this context. It makes no difference if the source of the harassment or interference was the government or private parties; if it impaired defendants' ability to repay loans, it is exculpatory.[2]

If this Indictment defines a broad range of information as potentially exculpatory to the defendants, thereby imposing a heavy burden on the government to search for exculpatory evidence, it is not the fault of the defendants, but of the prosecution team which has elected to frame the Indictment in this fashion.

Requests 1-18

The loan fraud counts in the Indictment allege that defendants made specific false promises as to repayment (*see*, *e.g.*, paragraphs 18, 19, and 25 of the Count 1 of the Indictment) while knowing full well that the monies that they were receiving would not be repaid in the manner promised. Defendants are also charged with inducing individuals to make loans by false statements, including statements that loans would be used for specific purposes (*see*, *e.g.*, paragraph 25(g) and (h)). Finally, defendants are charged with lulling activities concerning loans: allegedly making false statements to contributors through letters and other means explaining the failure to make timely repayment(s), while setting payment priorities which ensured that loans would not be repaid. (*See*, *e.g.*,

[2] Since comparisons with Judge Keeton's rulings in Boston will inevitably be raised—by both sides—it is important to note the following distinction between that case and this case. With respect to the conspiracy to obstruct justice case, Judge Keeton held that since it was the defendants' state of mind which was at issue, evidence of harassment was only relevant if the defendants' knew about the harassment. By contrast, evidence of harassment in this case is relevant regardless of defendants' awareness since the subjective and objective impacts are both relevant and potentially exculpatory.

paragraphs 30, 31 of the indictment, overt acts 20, 23, 34, 62 and 69).

In defense to the loan fraud charge, defendants will prove that they intended, and indeed expected, to repay the loans or, at very least, to achieve "forgiveness" of the loans. This expectation would have been realized had the government and other third parties not interfered in the financial relationship between the defendants and the lenders. Moreover, the defendants will show that the alleged "lulling" activities in fact accurately described a massive campaign of government harassment which caused the inability to repay. Thus, a large portion of the loan fraud charges were in fact brought about by covert government interference with the defendants' activities, thereby creating an intricate scheme of vindictiveness.

The overt acts section of the loan fraud conspiracy count of the Indictment cites selective passages from some of the documents the government will put before the jury to prove the lulling activities, including the Welsh memorandum (overt act 20), the TLC-IDL "Dear Supporter" letter (overt act 23), the Spannaus TLC letter (overt act 34), the TLC "Dear Supporter" letter (overt act 62), and the LaRouche-Sexton letter (overt act 69). AUSA John Markham from Boston, who will be assisting in this case, has notified counsel that he will seek to introduce a similar letter to supporter Carmen Canns by LaRouche at the trial of this case. These documents are annexed as Exhibit 1 to this Memorandum. Aside from the selective passages quoted in the Indictment these lettars state, *inter alia*, that there was a massive pressure campaign applied directly against Mr. LaRouche's supporters by the Government and private agencies (including but not limited to) the ADL, NBC-TV, banks and Democratic Party associated figures) to cease their financial support of defendants' organizations, and to turn supporters against defendants; that there was a coordinated campaign of derogatory media coverage concerning the financial status and practices

of the defendants directed at supporters and contributors; and that banks and other private institutions were conducting "financial warfare" against defendants by seizing funds or closing down accounts, and intervening to prevent further contributions or other financial support.

Each of the discovery requests specified in paragraphs 1-18 of defendants' motion is relevant, material and exculpatory to the defense of this Indictment. Requests 1, 5, 11, 12, and 13 request information in Government files concerning interference by the Government or third parties in the political and financial relationship between the defendants and various contributors/lenders. Defendants know of instances where contributors were called by the media or other parties, utilizing lists on public file at the Federal Election Commission or obtained from other sources, and warned that they would never get their money back or that defendants were engaged in violent or morally repugnant activities. Defendants have experienced instances where government agents, attorneys, banks, financial advisors or relatives have exerted pressure on contributors to end their financial support of, and political relationship with the defendants, utilizing the notoriety created by the media attacks and government investigations of defendants. In some circumstances, the exertion of such pressure was to the direct financial benefit of the person exerting it—money not designated for political causes would inure directly to them.

In each such instance, the contributor or supporter did not seek out the Government and complain of fraud. Rather, they ceased their support or became hostile to defendants after repeated pressures or inducements to do so by the government. While defendants know some aspects and instances of these activities, they are entitled to all information regarding such activities. Many of the individuals who have been subjected to such activities will no longer speak with the defendants, precisely because of these pressures.

In the Boston investigation, where a similar affirmative defense was at issue, prosecutor John Markham voluntarily disclosed to the defense all FBI 302's generated in the course of the "Boston investigation." These 302's revealed that the Government launched a nationwide dragnet for alleged "victims" of fraud on the eve of the November 1984 elections, based upon one complaint to the FBI and a news broadcast on the local NBC affiliate, WBZ-TV. This investigation coincided with the trial of defendant LaRouche's bitter libel suit against both NBC and the ADL, which suit revolved, *inter alia*, around the truth or falsity of NBC's allegations that the defendants were committing financial and tax fraud. Significantly, in the course of the litigation, NBC admitted having received "non-public" information from the CIA, FBI, IRS, and FEC.

The initiation of Boston investigation also coincided with Mr. LaRouche's efforts to purchase network television time for his presidential candidacy: an effort which was sabotaged as a direct result of government actions.

In its initial stages, the Boston investigation involved FBI and Secret Service efforts to locate individuals who claimed "unauthorized" credit card charges to "LaRouche-associated" entities. These individuals were then interviewed by the FBI and Secret Service. The 302's show that many of these individuals made no allegation of credit card fraud or, alternatively, were claiming "unauthorized" charges for other reasons. Nonetheless, after the FBI and Secret Service interviews, these individuals became hostile and in many instances, stopped supporting Mr. LaRouche's candidacy. While the Boston case mistried prior to presentation of the affirmative defense to the fraud charges, the 302's and the leads to witnessses provided by those documents were essential to the preparation of that defense. Moreover, much of the information obtained from them was exclusively in possession of the government. (Copies of interview questionnaires are annexed hereto at Exhibit 2.)

Requests 6, 7, 9, and 14 are requests for exculpatory information which pertain either to witnesses in this case, or to the suggestions to contributors about the of tax treatment of outstanding loans. Defendants are also aware of many instances where elderly supporters were subjected to threats or challenged as to their financial competency because of their voluntary support of defendants. For example, the daughter of Elizabeth Rose of Pennsylvania sought to have Ms. Rose declared incompetent because of her support for defendants. This affair ended when the courts declared Ms. Rose fully competent.

Information showing contributions or loans to other political organizations or charities, or which shows the witness's net worth, is exculpatory to the extent that (1) it shows that defendants were not extracting the last dime from alleged victims as implied by the Government's introduction of the Wayne Hintz memorandum into the Indictment; and (2) it demonstrates the "victim's" knowledge of the political nature of the loan.

The Government will attempt to prove that defendants' solicitations were a "commercial" investment and that this understanding governed the transaction between defendants and contributors. Defendants will rebut this allegation by demonstrating that the various "victims" were fully apprised that this was a loan to a political organization, with all of the attendant risks associated with such a loan. Similarly, the terms of the loan were negotiable. If tax advice was given concerning the loans, either directly or indirectly by the government, defendants contend that such advice should be disclosed.

Request 14 constitutes *Jencks* materials or *Brady* materials in this case. The correspondence and interview reports are either statements of the witness or materials from which impeachment develops. The materials requested constitute

prior statements of the witness concerning the transactions at issue in the Indictment.

Request 15 concerns Elizabeth Sexton and other contributors who communicated with defendants after becoming government witnesses. According to 302's provided by the Government in the Boston case, Ms. Sexton tape-recorded conversations with defendants after becoming a government witness. During the same time period, Ms. Sexton wrote the complaint letters to Mr. LaRouche which are at direct issue in Overt Act 69 of the Indictment. The government has provided other tape recordings by other witnesses similarly situated to Ms. Sexton. Defendants seek all tape recordings or other communications made following the development of the relationship with the government, instructions to the witness by the government directly or indirectly as to the format and nature of the call to defendants, and any evidence developed from such contacts which contradicts or is inconsistent with the witnesses' expected testimony at trial, as well as any other evidence which is exculpatory to defendants. This request includes any evidence indicating that the witness was aware that taping such calls was a violation of the law in states requiring two-party consent to such conversations.

Requests 16 and 17 seeks specific files on individuals whom defendants believe are victims of the financial harassment campaign against their contributors. Anne Cressom is an individual in New Jersey who was induced by relatives and law enforcement authorities to participate in the arrest of defendant Rubinstein. Civil litigation for false arrest in that instance led to a monetary settlement in favor of defendant Rubinstein. Barbara Newington was a major contributor to defendants. She was also a major contributor to causes associated with Lt. Col. Oliver North's fundraising operations. Defendants contend that Ms. Newington was subject to the same harassment for her association with defendants as other contributors. However, in her case the politically-motivated ha-

rassment came directly from the White House and the National Security Council.

Audrey Carter is a named "victim" in the Indictment. According to her original account, she ended her support for defendants after extensive pressures were exerted by an ADL-influenced newspaper reporter, William March, and her son, Alan Carter, a government employee.

Each of these incidents contributed to the belief held by the defendants, as expressed in the letters sent to contributors, that contributors and lenders to defendants were being subjected to "extortion" and "threats" by an illicit Government and private effort designed to financially annihilate them.

Requests 19-25, 29

At the outset of this investigation in 1984, the bank accounts of entities associated with defendants were shut down across the board, and these entities experienced a large wave of undocumented credit card chargebacks to their credit card acccounts—in which normal banking procedures were not followed. In many instances, the bank shutdowns followed visits or telephone calls from the FBI concerning defendants. Contributors reported that banks called to verify charges before they were actually charged to their accounts, instructed them on how to charge back, told them it was illegal to give loans to political campaigns by credit cards, or told of conversations with FBI or Secret Service agents in which it was implied that the contributor was under investigation by the government, or in which the FBI or Secret Service directly accused the defendant of fraud. Additionally, supporters were deluged with calls citing FEC records, asserting that their loans would never be paid back and that they were associated with a violent and anti-Semitic organization.

These 1984 events are specifically called "financial warfare" operations in both the alleged "lulling letters" and Welsh Memorandum which are central issues in the government's case. Moreover, these events completely disrupted defendants' finances from November 1984 through February of 1985, further exacerbating the defendants' inability to repay overdue loans. To the extent that the government, or banks which were conducting investigations in conjunction with the government, had a negative impact on defendants' finances, provoking or suggesting claims of "unauthorized" credit card charges, all such information would be exculpatory to defendants' case.

In late 1986 and 1987, prior to the government-initiated bankruptcy proceedings against entities associated with the defendants, there was a similar unexplained shutdown of bank accounts in Virginia following inquiries or visits by FBI agents as specified in Request 20. At the same time, defendants learned of many incidents with contributors or supporters where the Federal Express courier service actively interfered to prevent or dissuade them from contributing, using language which demonstrated an intimate knowledge of government allegations against defendants. As in 1984, there was also a sudden flurry of suits or service disruptions by major vendors in violation of previous arrangements and schedules for payments.

These requests or similar requests were granted by Magistrate Collings in the Boston case to the extent that the government was ordered to treat the requests as requests for exculpatory information pursuant to *United States v. Augers*, 427 U.S. 97 (1976). Magistrate Collings' decision is annexed as Exhibit "8" to this Memorandum.

Requests 26-27

Request 26 seeks information showing the extent of government awareness that "unauthorized charges" are not nec-

essarily fraudulent. In the Boston investigation and in the leaks to the news media about that investigation, every claim of unauthorized charge by credit card was treated by the government as an act of fraud. Defendants believe, however, that the government knew when it made these assertions that the "unauthorized charge" mechanism is the only means for a credit card holder to quickly adjust their balances should a charge be disputed or reconsidered for any reason, including a simple change of mind by a political contributor.

Request 27 seeks information concerning discussions with the Federal Election Commission concerning the availability of matching funds to pay outstanding debts to a campaign. The Government asserts in the Indictment that defendants made false statements if they asserted that loans could be repaid from federal matching funds. The FBI document annexed as Exhibit "5" to this Memorandum indicates discussions with the Federal Election Commission as to whether or not this is the case.

Finally, in Request 19 defendants seek information demonstrating that the government knew the financial status of the defendants in detail throughout the course of this investigation and took actions, whether they be "investigative" visits, legal actions, leaks to the news media or other actions to directly impact defendants' ability to repay loans. The statements attributed to government agents in the news accounts set forth in Request 37, *supra*, indicate that such monitoring occurred. Additionally, previous FBI investigations of defendant shave included such monitoring as a major investigative component. See Exhibit 3 to this Memorandum.

Requests 28-30

Defendants will argue that one reason for the increase in loans during the relevant periods was that their efforts to

derive revenues from sales and contributions were hampered by harassment. Defendants seek information in Request 28 pertaining to interference with access to solicitation sites such as airports, post offices and other government facilities and public access sites generally.

Requests 29-30 relate to other aspects of what defendants contend was a broad program of financial disruption. Vendors in 1984 and recently were prompted to take collection actions or curtail services despite previous payment arrangements. Such actions obviously skewed defendants' financial planning process. Chargebacks of travel credits by Sans Souci Travel Agency were a major feature of the government investigation at one point. These chargebacks were never documented and Peter Gonzalez, a cooperating government witness, claims to have had previous relationships with the government and the FBI.

Finally, there has been a broad campaign of harassment of the political candidates of the National Democratic Policy Committee—individuals who run for office and promulgate the policies and programs of defendants. The candidates' movement is the specific vehicle by which defendants have attempted to enlarge their movement. The success of these candidacies is a demonstration to the general public that defendants can achieve their goals and aspirations in the electoral process. Government or other interference with these campaigns is an important aspect of the disruption of defendants' political activities and their financial capabilities.

Requests 31-39

Requests 31-39 seek, broadly, information concerning the government role in the nationwide campaign of derogatory publicity which accompanied this investigation from 1984

through the present, and/or information in the possession of the government concerning this campaign.

The constant drumbeat of negative publicity dissuaded many supporters from making further contributions and effectively closed channels of expansion and growth, facts which the government acknowledges, as detailed below. In addition, defendants are aware of government agents repeating, verbatim, various derogatory media formulations concerning LaRouche to contributors who they interviewed, and disseminating packages of newspaper articles.

The first nationwide round of prejudicial publicity occurred with the opening of the investigation on the eve of the November 1984 elections. This publicity wave included FBI agents participating in broadcasts concerning defendants in Pittsburgh, and soliciting complaint calls in San Francisco. It immediately followed the NBC broadcasts in Boston and the public statements of U.S. Attorney William Weld announcing the commencement of the investigation.

The second major round of prejudicial publicity followed the victories of LaRouche supporters Janice Hart and Mark Fairchild in the Illinois primaries in March of 1986, and also followed a February 1986 national "Get LaRouche" law enforcement conference called by U.S. Attorney Weld. FBI documents released under the Freedom of Information Act complain, with some emphasis, that "the fundraising continues." (See Exhibit 5). This conference discussed a nationwide investigation of defendants including "civil aspects" of the Boston investigation. It was the imposition of $21 million in "civil" contempt fines, which generated the unprecedented government-initiated involuntary bankruptcy proceedings against entities associated with the defendants in April of 1987.

The Spring 1986 publicity wave featured, in newspaper after newspaper and television broadcast after television

broadcast, grand jury materials developed from the Boston investigation. This wave of publicity and grand jury leaks was particularly remarkable for the fact that at the time it occurred, no grand jury was even sitting in Boston. The government has argued in response to motions addressing 6(e) violations in Boston, that AUSA Dan Small misunderstood an order of Judge Mazzone sealing grand jury documents and that defendants' effectively waived their 6(e) arguments by filing appeals of Judge Mazzone's contempt rulings.

Two NBC News broadcasts on April 7-8, 1986 featured details of the government's investigation of defendants and allegations by a key government witness in the Boston case, Forrest Lee Fick, that defendants engaged in or plotted violence against public officials including Henry Kissinger. Additionally, NBC reporter Pat Lynch and writer Dennis King demonstrated intimate knowledge of the government's theory of the Boston case and anticipated testimony of witnesses before the subsequent grand jury in a Wall Street Journal article published on May 27, 1986. [Exhibit 6]

The government itself has acknowledged, according to news reports, the damaging effect of such publicity on defendants' finances. John Mintz, in a Washington Post article of September 14, 1986 entitled "Hard Times in LaRouche Camp" stated as follows:

> The LaRouche group raises most of its funds through telephone solicitation and in airports, and the damaging reports on LaRouche turned off many potential contributors, law enforcement officials and experts on the group said.

Following the October 6-7 searches and arrests in Leesburg, Virginia, the financial purposes of the government's investigation were also referenced in news accounts. Philip

Shenon in the New York Times of October 7, 1986 (Exhibit 7) states that:

> Justice Department officials said that Monday's developments would seriously harm, possibly cripple LaRouche's fund-raising efforts.

In the October 29th, 1986 New York Times, Shenon quotes law enforcement officials as follows:

> "Federal law enforcement officials have said their best hope of *disrupting* Mr. LaRouche's activities may be found in the thousands of documents seized earlier this month in a raid on his headquarters in Virginia. . . . . A Justice Department official . . . said that evidence gathered in the raid on Mr. LaRouche's offices could eventually cripple the fund-raising campaign." (emphasis supplied)

While similar statements are found throughout the articles annexed as Exhibit 7, perhaps the most dramatic government statements concerning this campaign occurred just prior to the government's bankruptcy action, based upon the government's contempt fines. Mintz, writing in the March 22, 1987 Washington Post, quotes anonymous law enforcement officials and others as follows:

> But LaRouche's followers say they will not give in to the pressure. The Leesburg-based organization has shown a remarkable capacity to reconstitute itself and seek new sources of funding in the face of many threats and internal divisions.
>
> The indictments . . . are known to be creating problems for the LaRouche organization's telephone fundraising, its main source of money . . . 'The boa is constricting. I know they're hurting bad', one law enforcement official said of the group.

Similarly, in a March 27, 1987 Associated Press release reporter William Welsh wrote the following:

> One source, who, like the others, spoke only on condition of anonymity, described the organization as a fragile structure as a result of the investigations and said, 'We're pulling out sticks one by one.'

The derogatory campaign against defendants continued through the Boston trial. Just prior to the commencement of that trial, Government witness Charles Tate appeared on CBS-TV's "West 57th Street" to elaborate the government's theory of the loan fraud in that case. Similarly, in December of 1986, just prior to the arraignment of defendants Spannaus and Robert Greenberg, the NBC Nightly News featured a story utilizing notebooks from the search and seizure, implicating defendants in the assassination of Swedish prime minister Olof Palme. Government witness Forrest Lee Fick was also featured on this broadcast. Swedish authorities disputed the NBC story. The notebooks in question contain references to defendants' journalistic investigations of the Palme assassination and suspect Gunnarson. Prosecutor John Markham has never provided a satisfactory explication of how the alleged notebook information was obtained by NBC.

Requests 42-55

The defendants will show that, contrary to the impression given in the indictment, their principal activities include news gathering and political and strategic analysis. The product of these activities is published and disseminated internationally.

In fact, the NCLC, EIR, etc., function as an international "think tank" of acknowledged first-rate quality. This is what prompted former National Security Council official Norman

Bailey to declare that EIR and the LaRouche group are "one of the best private intelligence services in the world" on NBC television on March 4, 1984.

Defendants and their associates had developed over the years many contacts and sources of information within the U.S. government (as well as other nations' governments). They had also developed access and influence at high levels in the U.S. government, which paid off in financial terms through sales of publications and reports and consulting contracts with government or government-related agencies.

Indeed, defendant LaRouche's move to Virginia in 1983 was urged by persons operating on behalf of government agencies, to facilitate their access to LaRouche and vice versa. Defendants expected that revenues from consulting contracts, etc., would increase significantly as their contacts and influence within the government grew.

However, beginning in 1982, a faction within the the Reagan Administration and the intelligence community moved to isolate and destroy defendants' access to government policy-formulation in the U.S. and internationally. The reason for this was not any unlawful activity by defendants—it was based in political opposition to the policies of defendants and a desire to end defendants' political influence.

The centerpiece of this effort was the circulation of the allegation that defendants' were agents of hostile intelligence services, funded by foreign sources, or engaged in violent activities. The proponents of these allegations, including John C. Train, the ADL, Daniel Patrick Moynihan, John Rees, Herbert Rommerstein, Walter Raymond, Henry Kissinger, Oliver Buck Revel, and Roy Godson, knew them to be false.

Michael Hudson, now a government witness in both the Boston and Alexandria cases, told defendants in early 1983

that the FBI was a principal participant in spreading derogatory information about defendants' "intelligence" activities. However, according to Hudson, the FBI would not openly investigate defendants for this because of First Amendment concerns. Instead the FBI would "target" defendants for prosecution under criminal statutes like "mail fraud". According to Hudson, this FBI "targetting" was to be accompanied by a derogatory press coverage aimed at ending defendants' access to the Reagan administration. The keystone of this effort was to be an expose in New Republic magazine. The key individual organizing this effort was John C. Train of New York City, according to Hudson.

FBI files released to defendants under the FOIA and civil discovery document aspects of this activity. The PFIAB Memorandum and the Nolan Memorandum annexed as Exhibit 9, demonstrate that as of early 1983 these allegations had achieved wide circulation in the government. Walter Raymond, a former CIA psychological warfare expert who was recently identified with illicit "black propaganda" operations against political opponents of the Reagan Administration, has been identified as the individual within the National Security Council disseminating these allegations. Moynihan, Godson, Rommerstein and Rees have also been identified as major dissemination points for this disinformation. Godson, Rommerstein and Rees have a long history of conspiring with the FBI in similar activities against defendants dating back to the mid-1970's.

During this time period, defendants were seeking and attaining consulting contracts for their intelligence services with foreign governments and with major private sector clients. In addition, through the publication Investigative Leads, defendants were establishing major customers for their publications throughout U.S. law enforcement. Events sponsored by EIR in Washington D.C. were widely attended by government employees and officials, including significant

representation from the U.S. military. EIR and Investigative Leads staff members participated in events sponsored throughout the country by organizations such as the American Legion.

In March of 1984, the effort to isolate and destroy defendants' access to the Reagan Administration went public, with the broadcast of NBC's First Camera attack on LaRouche. The program accused LaRouche of plotting the assassination of Jimmy Carter while warning that LaRouche had achieved critical policy-making influence within the Reagan administration. When the present criminal investigation was instigated in November of 1984, the New Republic article, *predicted by Michael Hudson*, and written by Dennis King and Ronald Radosh, also appeared. It identified some of defendants' contacts within the Administration and also warned that LaRouche had achieved a dangerous level of political influence.

National Security Council files released during the Boston trial appear to show that Norman Bailey was fired from the National Security Council, at the instigation of the ADL, following the First Camera broadcast, because of his association with defendants. Other journalistic sources and government contacts were warned by the FBI that they were in trouble or their security clearances were in jeopardy. CIA documents released during the Boston trial show that the CIA launched an internal investigation to determine which CIA employees had been in contact with the defendants.

In October, 1984 journalist Jeffrey Steinberg, a key contact point between defendants and government officials, was subjected to a classified FBI investigation for an alleged plot to assassinate drug dealers in Latin America. FOIA requests have identified an additional 4500 pages of FBI files concerning LaRouche and associates which the FBI claims cannot be released, presumably under National Secutity exemption. Discovery in the Boston case indicates that national security

investigations and other unspecified investigations of defendants were conducted in tandem with the criminal "fraud" investigation.

The national security and other investigations are not only significant for their chilling effect on defendants' contacts with government. Under the Reagan Administration's Executive Order 12333 and similar executive orders, these investigations can authorize otherwise questionable investigative techniques including "neutralization" by use of black propaganda and targetting of the financial infrastructure of specified organizations.

As a consequence of this effort to discredit the defendants, by 1985-1986, their access to key policy channels in the U.S. government was effectively driven underground. Each of the requests specified in paragraphs 42-55 seek information, exclusively in the possession of the government, which documents this aspect of the attack on defendants' financial capabilities and politicial influence.

Requests 55-60

From a review of the Indictment and the discovery provided to date, it is evident that a major part of the government's loan fraud case centers on alleged fraudulent fundraising in connection with the publication of the book *DOPE, INC.* in English and the parallel publication of the Spanish edition *NARCOTRAFICO SA*. Many of the alleged victims listed in the indictment assisted defendants because of their activities against drugs in Latin America and the U.S. and because of the intensive policy fight waged by defendants in the United States and Latin America in 1985-86 to implement LaRouche's 14-point war plan against drugs. Publication and dissemination of *NARCOTRAFICO SA* and *DOPE, INC.* were essential parts of this effort.

Under the government theory, as expressed by witness Chris Curtis in the Boston trial, defendants solicited loans on the basis that the money would go to the publication of this book. Instead, this theory goes, monies were diverted to other purposes and the book only achieved limited circulation and publication.

The defense against these allegations consists, in part, in documenting both defendants' wide-ranging actions around the publication and promotion of the books and the War on Drugs generally, and also the efforts to suppress the book by governments and powerful family groupings in Latin America traditionally linked to U.S. interests. *NARCOTRAFICO SA* was banned in Venezuela following raids on EIR offices and arrests of its correspondents. Lawsuits were filed against the book and its publishers in Venezuela and Peru. Newspaper articles appeared immediately upon publication throughout Latin America seeking to discredit defendants and the book. These articles used the same or similar formulations—all drawn from recent media coverage in the United States. Collaborators of defendants in Latin America were subjected to a systematic campaign of threats and harassment. There is evidence that some of this activity was coordinated with U.S. government personnel.

Defendants discovery requests, therefore, seek the relationship of key participants in the suppression of the book, with the U.S. government. If the U.S. government assisted efforts to suppress the book or detract from its success in Latin America, it is respectfully submitted that nothing could be more exculpatory in relation to the alleged loan fraud.

Requests 61-79

The evidence presented in discovery to date, the government's anticipated witnesses, and the similarity of this Indict-

ment to the government's argument and presentation in the Boston trial, make clear the government's intent to present, directly or inferentially, a false one-dimensional view of defendants and their political association, the NCLC. Under the government's theory, defendants used the NCLC as a money-raising machine dedicated to servicing the personal whims and fantasies of one man, Lyndon H. LaRouche. The political causes which defendants' claimed to espouse were merely excuses to raise money to support LaRouche. LaRouche exaggerated his importance and the claimed threats to himself. Everything, in reality, was subservient to maintaining LaRouche in a "lavish lifestyle."

The defense will correct this false portrait by demonstrating to the jury LaRouche's actual policies, activities, and importance. In the years 1984-86, a main focus of these activities was the implementation of an actual war on drugs in Latin America and the United States, and reorganization of international financial arrangements, including extensive work in Latin America designed to organize a debtor's cartel to force such rearrangements. Another central area was that of defendants' vociferous opposition to the U.S. government's Central America policy, particularly the support of the "Contras." This is what the fundraisers told contributors about. These developments were reported and fought for in the multitude of publications and writings of defendants. These programs were the subject of presentations to government officials and public figures internationally, particularly by defendants LaRouche and Small.

These policies were vigorously opposed by many individuals in the Reagan Administration and the Democratic Party. The requests specifically seek government files demonstrating direct or indirect government opposition to these policies and direct or indirect government actions undertaken to defeat these policies in Latin America and the United States. They also seek information demonstrating the relative success of

defendants in influencing policy in these countries, existing in government files concerning meetings and events held by defendants in these countries and others.

A related feature of the government efforts to contain or destroy the influence of LaRouche and his associates in Latin America, is the chilling effect they had on the defendants' ability to expand their consulting work—both in Latin America and on the subject of Latin America. Evidence of such sabotage of the financial viability of the defendants' activities would clearly be exculpatory.

Requests 80-81, 40-41

These requests concern government information pertaining to events in defendants' place of residence, Loudoun County, Virginia. Shortly after defendants arrived in Loudoun County, controversy ensued. Wild rumors were spread throughout the community concerning the alleged "armed camp" where LaRouche lived. The hysteria generated led the Loudoun County Planning Commission to deny a zoning permit for a children's summer camp because it was associated with defendants. Concealed weapons permits were denied to LaRouche bodyguards who documented a need for their use. The local Sheriff's deputies commenced an investigation which, as has been testified to, was not based upon any law enforcement predicate, just general suspicion. (See Exhibit "15" to this memorandum).

Two ventures were undertaken to counteract what defendants' regarded as a COINTELPRO-like program by the FBI designed to make the living conditions of defendants unbearable. Associates and supporters of Mr. LaRouche purchased a radio station, WTRI, and started to publish a local newspaper, called The Loudoun County News (and later, replaced by EIR News for Loudoun County after the government-initiated

involuntary bankruptcy proceedings against Campaigner Publications). Advertisers of the radio station and newspapers were subjected to threats and harassment, and staff of WTRI were barraged with pressures to resign. Other ventures contemplated by some of the defendants were subjected to similar interference and disruption. All of these activities resulted in diversion of resources and energies of the defendants which, without government and other harassment, would have been unnecesssary.

Requests 82-86, 99, 111

These requests seek to ascertain the relationship of fundraisers or other employees of defendants, former members of the NCLC, and contributors and lenders, to the government, the ADL, NBC, Dennis King, or other known political opponents of defendants who have played a role in this investigation.

To the extent that such request fall squarely within a conservative reading of *Rovario* and *Estrella*, or impeachment of a known government witness, the requirement for this information will not be argued here. (*See*, *e.g.*, Request 105). This Memorandum addresses only why a broader *Brady* requirement is imposed by the specific circumstances of this case.

In the Welsh Memorandum and in the "lulling" letters claimed to be false by the government, it is stated that defendants are the subject of "sting operations," infiltration, and dirty tricks by individuals associated with NBC, the FBI, ADL, and others. There is a long and documented history of such operations by the government, including attempts to involve defendants in criminal activities or to suggest criminal activities. (*See* Exhibit 16 and 17). This history formed, in part, the basis for the assertions in the letters. Defendants

were otherwise advised by their intelligence sources of the actions of certain adversaries during events at issue in the indictment. Whether or not these individuals were acting with the government or other outside agencies against defendants interests, is information exclusively in control of the government. It is relevant, material and exculpatory because it will make the claims in the letters more credible to the jury.

Requests 87-98, 100, 110, 112

These requests seek any government information concerning the relationship of sources or informants of the Security and Intelligence staff to the government, the ADL or NBC, Dennis King or other individuals.

The indictment argues that monies were diverted to LaRouche for his personal benefit and that "security" was the wrong priority for payment—monies diverted to "security" should have been paid to lenders. In the Boston case, through the testimony of Chris Curtis, Charles Tate and others, the government sought to establish directly and by inference that the security threat to LaRouche was exaggerated and unreal and that defendants' paranoia concerning this issue contributed to a complete disrespect for laws and their debts to lenders. A fair reading of the indictment and the discovery produced to date demonstrates that this prosecution will proceed under the same or similar theories.

In addition to information about security threats to LaRouche and others, the sources of the Security and Intelligence Staff provided detailed information about the "financial warfare" activities at issue in the Welsh Memorandum and the lulling letters.

To rebut the inferences the government wishes to draw, the defense will put before the jury the reality of the threats and incidents, and what they were told by various sources. These sources claimed to be acting on behalf of the government or the intelligence community when they delivered information concerning threats to LaRouche. Any information which the government has concerning the relationship of these individuals to the government or political adversaries, or reflecting government knowledge of the activities of these individuals, is relevant and exculpatory in the circumstances presented by this case.

Requests 101-107, 111-112

These requests seek the informant status and government and private inducements to NCLC members and supporters. Additionally they seek government files on certain NCLC members, whether or not the individuals are witnesses in this case.

Throughout the course of this entire investigation, and throughout the time period which appears to be at issue in the indictment, dating back to 1979, members of the NCLC and their collaborators have been subjected to relentless external pressure by the government, the ADL and other agencies in order to assure their exit from the organization or withdrawal of support. Again, there is a history to this. (See Exhibit 17).

Since the NCLC is composed of a finite number of individuals and since financial support comes directly from the activities of NCLC members preparing and disseminating policies and ideas and asking their collaborators to support them, any successful government or adversary effort to turn away these individuals impacts directly on the financial well-being of the organization. This occurs regardless of whether

or not the individual directly witnessed events alleged to be part of the conspiracy in this indictment.

Additionally, some former members of the NCLC have been the bread and butter of the government's prosecutions and defamation activities conducted against defendants. The Wall Street Journal article annexed as Exhibit 6, reports of defendants' sources, and testimony at the Boston trial concerning the "Halloween Party" suggest that these individuals were informants shared by NBC, the ADL and the government, and that they were organized into a collaborative network whose declared goal was to "jail LaRouche" at any cost. All information known by the government about the relationship of these witnesses to each other is relevant and exculpatory as demonstrating the nature and extent of adversary actions against defendants and the bias of potential government witnesses.

Requests 111, 111(A), 111(B) and 112 seek information respecting the theories which underlie the government's investigation and prosecution of this case. Based on the evidence presented in the Boston prosecution, and on the present Indictment, it is very likely that the government will portray the NCLC as a conspiratorial enterprise, operated for sinister and criminal purposes and controlled by the "authoritarian" LaRouche.

Defendants will show that the theoretical basis for the government's characterization of LaRouche and the NCLC is drawn from a political and philosophical current which is bitterly hostile not only to that of LaRouche, but to the basic philosophical traditions of Western Civilization. Defendants expect to argue this to the jury in order to prove malice and the motivation for this prosecution. Thus, the information requested herein is exculpatory within the scope of *Brady*.

Requests 108, 109, 113-119

Request 108 seeks disclosure of all files pertaining to specific individuals who defendants' sources stated posed a threat to LaRouche. Request 109 seeks disclosure concerning an incident which defendants contend was an entrapment and unlawful government action designed to impact the decision as to whether LaRouche received Secret Service protection in 1984. Both incidents are relevant and exulpatory under the requirements set forth for Requests 87-98 above.

Defendants believe the exculpatory nature of the information requested in paragraphs 113-118 is also immediately clear from the other arguments already set forth in this Memorandum. Additionally, the information requested in paragraph 113 is relevant to any defense of entrapment as it demonstrates lack of predisposition.

Request 119 is exculpatory and relevant if the government intends to use, as it did in Boston, the LaRouche telegram to President Reagan in any fashion, including in the testimony of witness Chris Curtis. This is also *Brady* material because it demonstrates improper government motives to the jury. Again Egan and others have already testified and events have shown that there was no probable cause of the arrest of LaRouche or the entry on to Ibykus Farm, reported as imminent in the news media on October 6th, then or at any time thereafter.

Paragraphs 120-128

Requests 120-128 seek disclosure of the questionable tactics employed by the various agencies involved in this investigation. Some of these practices violate agency rules and regulations. They represent impeachment materials on potential government witnesses such as Larry Lucey or any agent of

the IRS. The coordination of the investigations, crossing the border and into a full scale invasion of the due process rights of these defendants, supports defendants' contentions that they were subject to a politically-motivated government assault. The coordination and government statements concerning the investigations also suggest that a major goal of these investigations was to disrupt defendants' finances and bleed them financially—dramatically impacting their ability to repay the loans at issue.

Request 124 is otherwise addressed to general exculpatory evidence on the tax count and Request 125 seeks any SEC communications concerning the treatment of political loans as "securities." Since the state prosecutions charging securities fraud have been run as a joint effort with the federal investigation, any SEC opinion or consideration arguing against or questioning such treatment of these promissory notes, is relevant and exculpatory in the circumstances of this case.

Finally Request 128 seeks disclosure of discussions had at the February 1986 meeting of law enforcement officials in Boston. That meeting was called with great fanfare to discuss formation of a national task force to prosecute LaRouche by U.S. Attorney William Weld, according to IRS agent Larry Lucey's testimony in the Virginia state criminal case. By the end of the meeting it was decided that only localized investigations should proceed. Defendants seek all discussions from that meeting which suggest that law enforcement officials disagreed with Weld's assessments as to the fraud scheme at issue or its magnitude, or any information which suggests that tax prosecutions or loan prosecutions were felt to be unwarranted by law enforcement officials attending the meeting. Additionally, defendants seek any discussions from that meeting which would suggest or tend to suggest that the investigations of defendants were politically motivated, de-

signed to drain defendants' financial resources, or any other arguably exculpatory information.

Requests 130 To The End

Requests 130 to the end concern allegations set forth in the Indictment. To the extent that the government possesses any evidence or information that negates, contradicts or otherwise qualifies any of the allegations made in the Indictment, it should immediately disclose such evidence or information on the ground that it is exculpatory *per se*.

CONCLUSION

For all of the reasons set forth above, defendants respectfully request that their Motion for Disclosure of Exculpatory Material be granted.

Dated: November 7, 1988

Respectfully submitted
for all defendants,

SHAW, PITTMAN, POTTS & TROWBRIDGE

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APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)
	) CRIMINAL NO.
v.	) 88-00243-A
LYNDON H. LAROUCHE, JR., et al.	)

GOVERNMENT'S MOTION IN LIMINE

COMES NOW the United States of America, by undersigned counsel, and submits this Memorandum to discuss the relevance and lack of relevance of certain matters which it is anticipated that the defendants will seek to mention in their opening statements, use in cross-examination of government witnesses and use in examining their own witnesses. The defendants have indicated that they intend to defend this case by claiming vindictive prosecution, harassment by the government, and that their inability to repay loans was due to "financial warfare" brought against them by the government. This intent is apparent from the CIPA notice filed on November 4, 1988, conversations with counsel, and the conduct of the related trial in Boston. The purpose of this motion and memorandum is to set forth the government's view on the relevancy and admissability of such claims. The matter should be resolved prior to trial lest this case begin with claims by the defendants — as they did in Boston,— that they intend to prove a 17-year pattern of harrassment and persecution of their organization at the hands of the FBI.

There are several incidents into which it appears the defense intends to delve: prior FBI investigations; asserted

infiltrations of the LaRouche organization by informants; other criminal and civil proceedings; and the institution of involuntary bankruptcy proceedings in this District. It is the position of the government that these incidents essentially are irrelevant.

This case involves fraudulent solicitations of loans, specifically promises that loans will be repaid at a certain time and interest rate. The only real jury issues presented by this case thus are (1) the content of the solicitations, (2) falsity of the solicitations; (3) knowledge of the defendants of the solicitations and their falsity. Undeniably, the financial status of the LaRouche organization, is relevant to the defendant's belief at the time of the solicitations of their ability to repay. And an outside influence that disrupts that belief could conceivably be relevant. Hence, if the defendants were able to establish some action by the government, which was unknown or unexpected, they might be in a position to show that such an action frustrated their expectation that repayment would be made. None of the incidents here, however, even remotely have such a foundation. Hence, the government contends all references to them should be excluded.

The one exception to this position is the bankruptcy filing, which accordingly is discussed in somewhat more detail below. There are aspects of the bankruptcy proceeding which the government intends to introduce, but the entire bankruptcy case should not be retried in the criminal forum.

I. The Bankruptcy Proceedings Commenced Against Three Entities Controlled by Defendants

Involuntary bankruptcy proceedings were commenced in April, 1987, against three business entities used by defendants to borrow the funds which are the subject of the loan fraud charged in the indictment. Defense counsel have indi-

cated in conversations with the government that they intend to seek introduction of evidence relating to the bankruptcy during the criminal trial, and have declined offers to stipulate to the relevant aspect. Under separate headings below we discuss (1) the loan fraud charges involving the now bankrupt entities, (2) the bankruptcy proceedings, (3) the matters relating to the bankruptcy proceedings which are relevant to the charges, and (4) the matters relating to the bankruptcy proceedings which are not relevant to the charges and which would, if allowed into evidence, be confusing, wasteful and open the door for extensive rebuttal evidence by the United States.

A. The Loan Fraud Charges Involving The Now Bankrupt Entities

The conspiracy and substantive mail fraud charges (Counts 1 through 12) charge in essence that the defendants all conspired (Count 1) and schemed (Counts 2 through 12) to commit mail fraud by inducing many people to lend large sums of money to various LaRouche controlled organizations by the use of false statements and by the omission of material facts. The false statements included (*inter alia*) promises that the loans would be repaid, assurances of the ability of the organization to repay the loans, promises that the loans would earn interest, promises that interest and principal would be repaid on dates certain and promises that the monies loaned would be used for specified purposes. The material omissions included the failure of defendants to inform prospective lenders of the fact that the organization did not have assets to stand behind the loans, that the organization had a host of financial problems, that the organization had previously defaulted on many loans and had a policy of avoidance of loan obligations.

When defendants were soliciting the loans involved in the alleged scheme, they did so as representatives of various

business entities operated by them and by other members of the National Caucus of Labor Committees.[1] The three entities through which most of the unrepaid loans were raised during the life of the alleged conspiracy are Campaigner Publications, Inc. ("Campaigner"), Caucus Distributors, Inc. ("Caucus") and Fusion Energy Foundation ("Fusion").

When defendants induced individuals to lend money, the checks written by the victims to make the loans were made payable to Campaigner, Caucus or Fusion and the individual lending the money would be issued a promissory note signed by an officer of Campaigner, Caucus or Fusion. As with all promissory notes, the ones here involved the specified amount loaned, the rate of interest, when interest was payable and when the principal was to be repaid.

The size of the loans varied. The witnesses scheduled to testify will show that they lent (and lost) amounts ranging from $15,000 to $250,000. While the terms of each of the notes involved varied, the testimony will be that not once were the notes paid as originally agreed and, indeed, little if any principal or interest has ever been paid.

The indictment charges that the above described loan fraud conspiracy began in July, 1983 and continued until April 19, 1987. At trial, the evidence will show that all of the fraudulently obtained loans were procured during the life of the conspiracy (between July, 1983 and April, 1987) and that each of the loans was, according to the terms on the notes involved, past due and thus in default long before the last day of the alleged conspiracy.

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[1] The National Caucus of Labor Committees ("NCLC") is an association which acts as an umbrella organization for all the various entities which support defendant LaRouche. The NCLC is described in more detail in the Indictment, paragraphs 1 through 6.

Thus, in connection with every loan as to which the government will offer proof, Campaigner, Caucus or Fusion was the borrowing entity, very little of the promised interest or principal had been repaid and the time specified in the note for repayment had past long before April 19, 1987, the day on which the conspiracy ended.

The conspiracy is alleged to have ended on April 19, 1987 for one reason only. On April 19, 1987, the three borrowing entities, Campaigner, Caucus and Fusion, were forced into involuntary bankruptcy, thus ending, by operation of law, defendants' ability to raise more funds by borrowings through these three entities and ending the ability of the entities to repay the loans involved except by distributions ordered by the bankruptcy court.

B. The Bankruptcy Proceedings

In early 1987, the United States District Court for the District of Massachusetts imposed contempt fines against the three entities in the following amounts: Campaigner - $5,180,000; Fusion - $5,180,000, and Caucus - $6,275,000. These fines were levied because the entities involved had refused to obey a prior court order directing turnover of documents to a grand jury and imposing a $5,000.00 fine for each day of non-compliance and, additionally, because the District Court that certain of the records had been burned after they had been subpoenaed.

The fines involved were reduced to judgment by the United States. As judgment creditor, the United States sought voluntary payment. When this was refused, the United States commenced an involuntary bankruptcy proceeding in this District against Campaigner, Caucus and Fusion and obtained an order from the Bankruptcy Court (1) appointing Interim Trustees, (2) directing the Interim Trustees to seize

the assets of the three entities, (3) directing the Interim Trustees to run the businesses of the entities and to refrain from the payment of any debt other than as approved by the bankruptcy court. [A copy of the Order Directing Appointment of the Interim Trustees is Annexed.]

The Interim Trustee Order was obtained upon the detailed showing to the bankruptcy court that the entities involved (1) had extensive outstanding indebtedness, (2) had been ordered by various states to cease and desist solicitation of loans within their borders, (3) had destroyed financial records under grand jury subpoena, (4) had refused to obey federal and state court orders, (5) were under indictment in various locations, and (6) had hid assets to defraud creditors. When the bankruptcy court's Interim Trustee Order was appealed by the entities involved, this Court affirmed the Order based upon its finding that the above described showing justified issuance of the Interim Trustee Order. After the issuance of the Interim Trustee Order, the Interim Trustees temporarily padlocked the offices of the three entities, seized all of the business assets of the three entities, including all funds in all the bank accounts operated by the three entities. It is not an understatement to label the three entities "empty shells." In contrast with the multimillions of dollars owed collectively by Campaigner, Caucus and Fusion to thousands of individual and trade creditors,[2] the total assets including, land, other property and cash found by the Interim Trustees, totalled less than $300,000.00 for all three entities combined. Thus, as of the time of the bankruptcy seizure, each of these entities was wholly unable to repay the massive outstanding loans and was certainly not in any financial position to continue assuring past lenders that they would be repaid much less to continue borrowing new funds upon similar assurances.

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[2] *Apart from* the $16,000,000.00 owed on the fines imposed by the Boston court, internal documents showed the entities owing approximately $30,000,000.00.

C. Matters Relating to the Bankruptcy Which Are Relevant to the Trial

The matters relating to the bankruptcy which are relevant to this trial are as follows:

(1) That on April 24, 1987, Campaigner, Caucus and Fusion were forced into involuntary bankruptcy by Court order;

(2) That the entities could not borrow additional money on and after April 24, 1987;

(3) That the entities could not repay any lenders on or after April 24, 1987;

(4) That the Interim Trustees found only the limited assets they did when they gathered up all of the assets of the three entities.

The relevance and the manner of proving each of these four matters are discussed separately below.

1. The Involuntary Bankruptcy of April 24, 1987

The fact of the bankruptcy is relevant to show the effect on the three entities borrowing and repayment (points (1) and (3) discussed next below) and to explain why the Interim Trustees were in a position to and did gather all of the assets of the three entities (discussed at point (4) below). The fact that the bankruptcy was involuntary is important to show that the effect of the bankruptcy - cessation of both borrowing and repayment - was not voluntary of the defendants who controlled the entities but was rather imposed by an outside force.

The fact of the bankruptcy would be shown by introduction of a redacted version of the annexed Order Appointing

Interim Trustees along with those portions of pages 5, 6, and 7 of the Order which are underscored on the annexed copy of the Order. The underscored portions of the Order quickly and clearly explain the function of the Interim Trustees without any of the prejudice to the defendants which would result from a reading to the jury of the entire Order.

2. The Bankruptcy Proceedings Effect on Future Borrowings or Repayments

All of the massive borrowing and such little repayment of loans as occurred came to a halt on April 24, 1987. The reason for the abrupt cessation is relevant.

As to the cessation of borrowings, the reason for such cessation is important to show that defendants continued to borrow (on false promises and fraudulent omissions) until they were forced to stop by an outside force. This explains why the conspiracy is alleged to have ended when it did.

As to the cessation of what few repayments there had been, the reason for the cessation is relevant and assists defendants with showing why, at least after the date of the bankruptcy, there were no repayments. It is emphasized here that, particularly in connection with the direct and cross-examination of the victims who lent money and were not repaid, the Court must either allow this limited evidence of the bankruptcy and its effects or impose a blackout on any questioning of the victims about events after the bankruptcy filing, including further actions taken to collect the past due debts and further discussions between the victims and defendants or other co-conspirators about the past due debts. Any questioning about events or discussions post-bankruptcy would, if answered completely, illicit the fact of the bankruptcy. This is because defendants repeatedly used the bankruptcy, after it occurred, as a reason of explaining to victims the latest reason why repayment was not possible.

Cases have repeatedly held that "a conspiracy is presumed to continue until there is affirmative evidence of abandonment, withdrawal, disavowal or defeat of the purposes of the conspiracy." *United States v. Block*, 696 F.2d 1213, 1215 (9th Cir. 1982); *see also United States v. Hamilton*, 689 F.2d 1262 (6th Cir. 1982), cert. denied. 459 U.S. 1117 (1983). The United States should be allowed to show the cause of the end of the conspiracy.

3. The Evidence of the Few Assets Recovered by the Interim Trustees

It is highly relevant that, as of the time of the freezing of the assets of the three entities, a time just following the end of the conspiracy, each of the three entities were empty shells. The lack of assets shows among other things that the lenders would not in fact ever have been repaid much less repaid at the times promised. It also shows the absolute falsity of defendants' assurances to prospective borrowers that investing in a short term basis with Campaigner, Caucus or Fusion was "safer than with a bank."

Even in cases where it is assumed that the defendants involved in soliciting loans had no knowledge of the actual lack of assets backing those loans,[3] such lack of knowledge does not exonerate them from conviction under the mail fraud statutes if they obtain loans by asserting that assets exist to repay the loans. In *United States v. Henderson*, 446 F.2d 960 (8th Cir. 1971), defendants were convicted of mail fraud in connection with their false representations to lenders that they would be repaid. Much like the evidence anticipated in our case:

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[3] And at trial we will show that these defendants did have working knowledge of the lack of assets of Campaigner, Caucus or Fusion.

> The evidence is replete with instances where only isolated interest payments were made to investors. Only a few people ever received back any of their principle.

446 F.2d at 963.

In *Henderson*, a certified public accountant testified that "[A]ccording to a CPA's review of its financial records the corporation was at all times insolvent during its operation" 446 F.2d at 963. Defendants argued that the financial state of the company on whose behalf they were soliciting loans should not have been allowed into evidence against them because the prosecution had not shown that they had knowledge of how bad things were and thus the prosecution could not show that defendants have made their representations to prospective lenders in bad faith. The Court rejected this argument:

> There was sufficient evidence to refute the alleged good faith defense by the defendants
>
> * * *
>
> . . . assuming *arguendo* that they did lack knowledge of the company's financial condition, the criminal law does not condone ignorance of facts as an excuse for reckless' misrepresentations made to induce innocent victims to part with their money when the facts would require some preliminary investigation.

446 F.2d at 963.

Henderson's facts are not only virtually identical to those of this case, its holding derives from the well settled principle that the making of false representations made without any basis for believing them gives rise to criminal liability under 18 U.S.C. Section 1341. *See United States v. Boyer*, 694 F.2d

58, 60 (3rd Cir. 1982) ("no amount of honest belief that the enterprise would ultimately make money can justify baseless, false or reckless misrepresentations or promises"). *Boyer* cited *Henderson* and a whole series of Circuit decisions affirming this principle. 694 F.2d at 60.

Moreover, cases have held that evidence of the actual state of the entity's financial condition can come not only from a Certified Public Accountant as was allowed in *Henderson*, *supra* but also by the testimony of a trustee who locates the assets after bankruptcy. *Sanders v. United States*, 415 F.2d 621 (5th Cir. 1969). In *Sanders*, the "scheme alleged in brief was that the defendant would through misrepresentations of various sorts defraud the public by selling worthless securities of those [three] corporations" 415 F.2d at 624. The Court allowed a bankruptcy trustee to testify as to the value of the assets at the time he took over:

> Appellant contends that it was error to permit the trustee in bankruptcy to testify as to the amount realized through sale of the assets of appellant's corporations when the value of said assets lay at the heart of this case. Here we need not tarry long. The alleged conspiracy dated from November 22, 1957 to March 15, 1965. The trustee was appointed November 30, 1964 and embarked upon his duty of marshalling the assets of the three bankrupt corporations. . . . Certainly the amounts he was able to realize from the sales comes within the range of relevant and legally competent evidence. . . .

415 F.2d at 629.

4. Matters Relating to the Bankruptcy Which Should be Excluded as Irrelevant

No evidence should be allowed relating to the fact that the bankruptcy was initiated by the United States or the fact

that United States Marshals padlocked the business locations of the three entities for a time after the Interim Trustee Order was entered. These two facts are not relevant.

Nothing on relevance is shown by the fact that it was the United States which forced these bankruptcies. The fact that they were forced has the relevant consequences discussed above but who forced them does not make any fact at issue in this case more or less probable within the meaning of Rule 401, Federal Rules of Evidence. While this fact would allow defendants to argue that the United States is being "vindictive" that is not a jury issue but is one for the court to decide by pretrial motion.

Who forced the bankruptcy is equally irrelevant to the issue of why there was no repayment during the life of the conspiracy. This is because the bankruptcy proceedings were forced after the conspiracy is alleged to have ended. The United States must prove that all the elements of the offenses occurred during the life of the conspiracy.

The padlocking which occurred on April 24, 1987 is equally irrelevant given that the conspiracy is alleged to have ended by this time.

Obviously, if defendants are allowed to prove the fact of who forced the bankruptcy and of the padlocking, the United States should be allowed to show why it forced the bankruptcy and why the padlocking occurred. This would involve an extensive showing of the reasons for the massive contempt fines and the other debts and misconduct which resulted in the bankruptcy and the padlocking.

II. Other Matters to be Excluded as Irrelevant

Various attempts were made by the defendants during the course of the Boston litigation to discover and introduce

evidence relating to various law enforcement actions. They are presented here in some detail to apprise the court of the nature of the matters the defense likely will try to raise, and their hopelessly overbroad notion of what is relevant to criminal charges such as those here.

A. Evidence of F.B.I. or Law Enforcement Activities

During the course of the criminal trial in Boston, counsel for several defendants raised in their opening statements (and attempted to demonstrate in cross examination of government witnesses) arguments regarding the activities of law enforcement agents for the past twenty years. Defendants repeatedly sought both to discover and introduce evidence and conjecture relating to the governments possible use of informants and other investigative techniques; evidence relating to what defendants have termed "FBI infiltration" of the LaRouche organization; and evidence relating to investigations of persons and entities associated with the defendants which do not relate to the instant charges. This case promises to involve the same attempts. Already, in a pre-trial motion made under section 5 of the Classified Information Procedures Act (CIPA) (filed on November 4, 1988), defendants have sought discovery of FBI files which do not relate in any way to the charges in the indictment, and defendants have already indicated their intention to offer such files into evidence if discovery is permitted.

B. Evidence Relating to "Infiltration"

During the course of various investigations of the LaRouche organization, law enforcement agents (on a few discrete occasions) obtained the cooperation of certain individuals in making pretextual telephone calls to persons associated with defendants, or, in one case, to visit the offices of the LaRouche organization to obtain currency for the search war-

rants. None of these incidents have any conceivable relevance to the charges pending here. Each is discussed separately below.

1. Evidence Relating to Ryan Quade Emerson.

In preparation for the searches of several buildings operated by supporters of defendant LAROUCHE conducted on October 6, 1986, law enforcement agents interviewed several individuals who were able to provide information concerning the nature and location of evidence which might be found. One individual, Ryan Quade Emerson, had formerly been a "consultant" to the Security and Intelligence staff of the LaRouche organization, and was believed to have had knowledge about the location of the LaRouche organizations' offices which would be useful to add to the search warrant application. Emerson's involvement in gathering evidence for the search warrant was the subject of an evidentiary hearing in Boston, after which Judge Keeton made the following findings of fact:

> 64. At some time before September 29, 1986, [FBI] Agent Klund instructed Emerson to visit the offices located at 722 East Market Street, Leesburg, Virginia, in order to determine the layout of the offices. Klund's objective (which was not disclosed to Emerson) was to gather information to aid in obtaining a search warrant. At that time, Agent Klund gave Emerson instructions regarding a "cover" story to avoid arousing defendants' suspicions that Emerson was making the visit to obtain information for the FBI. Agent Klund told Agent Egan about his plans to use Emerson.
>
> 65. The story told to the defendants by Emerson at the time of Emerson's visit at the end of September 1986 was the story suggested to Emerson by Klund.

AUSA John Markham ("Markham") conceived the substance of this cover story and conveyed it to Klund. AUSA Markham did not write down or memorialize the cover story. To make the story credible to defendants, AUSA Markham proposed including information the defendants already knew to be true. Markham wanted the story to be a "cover" to deflect suspicion from Emerson and from the upcoming search. Though not knowing at the time he proposed the cover story to Klund, Markham knew no later than October 3 or 4 that the person who was to use the cover story was Emerson. At the time Markham conceived the cover story late in September 1986, Markham did not know that Emerson had already re-established contact with the defendants.

66. At the time Mr. Markham conceived the cover story, he knew that the defendants had a practice of writing down notes about much of what they heard. I find, contrary to defendants' contention, that Markham did not act with intent to cause the story to be written into a notebook entry. Rather, his intent was simply to provide a cover that would avoid alerting defendants and causing them to anticipate the planned search pursuant to the warrant.

67. The cover story that Emerson used was the following:

> That Emerson should go to the location and tell whoever he saw that he had word about Boston; that he had learned that the federal investigators had located one person who they thought would be helpful; that that person had left the country; that they found another person who they thought would be even more helpful who lived in Pennsylvania and they were considering putting him

> in front of the grand jury; that they were making an all-out push to find Mike Gelber; and that there was a new U.S. Attorney in Boston and the U.S. Attorney was in the process of assessing what he would do with the case.

Transcript Vol. 93, p. 27

68. When Emerson talked to Michelle Steinberg on September 29, 1986, he did not enter into the security offices. An unidentified person answered the door. Michelle Steinberg came to the door, and she and Emerson went outside of the building to speak.

69. As a result of the information provided to the defendants by Emerson at the instruction of Agent Klund, the following entry appeared in Jeffrey Steinberg's notebook on September 29, 1986:

> QED—Weld—Gelber 5th Amendment [—] Ready subpoena—McNamara nothing to do w[ith] it. Levy fled.

Gov. Exh. 153, p. 98 (J. Steinberg Notebook, 9/29/86). Findings of Fact, *United States v. The LaRouche Campaign, et al.*, (No. 86-323-K, D. Mass. April 8, 1988).

In addition, the testimony at the hearings regarding Emerson indicated that the reason the "cover story" was provided by Special Agent Klund to Emerson was to minimize any suspicion on the part of members of the LaRouche organization that a search or other law enforcement activity might be imminent. Special Agent Klund testified that he was worried that if members of the LaRouche organization were aware or the search, they might destroy or relocate evidence, and, more importantly, that he was afraid that searching officers might be met with armed resistance. Klund based this belief on his knowledge that defendants caried and were trained in

the use of firearms, and had developed elaborate security precautions and procedures. As a result, Emerson was provided with this cover story, and in fact used a cover story to obtain access to the LaRouche offices to provide currency for the warrant.

The government's use of Ryan Quade Emerson in this investigation, and the use of this cover story is totally irrelevant to any of the charges contained in the instant indictment. Emerson is. . .not a witness for the government in this case, and the "cover story" does not appear in any exhibits which the government intends to offer in its case in chief. Moreover, if the defendants seek to offer the government's use of Emerson and the related "cover story" the government will seek to offer evidence of defendants' possession and use of firearms which was the reason for the "cover story." Therefore, evidence relating to Ryan Emerson is irrelevant to this case and should be excluded.

2. Lewis, Howard and Tucker

In their CIPA notice filed on November 4, 1988, defendants annexed copies of governnent memoranda which related to three individuals, Frederick Lewis, Gary Howard and Ronald Tucker. Lewis, Howard and Tucker have previously claimed that they attempted to "infiltrate" the LaRouche organization at the behest of the government. However, any such evidence is irrelevant to any possible issue at the instant fraud trial. The fact that someone claims to have infiltrated the organization is of no consequence to the issues.

3. Forrest Fick, Mordechai Levi and Others

On several occasions individuals associated with the LaRouche organization made pretextual telephone calls at the behest of the government either to members of the LaRouche organization, or to persons associated with such members.

These pretextual calls were recorded with the consent of one party. Both Forrest Lee Fick and Moredechai Levi made such telephone calls, and the contents of these calls were disclosed to defense counsel in Boston in connection with discovery there. The evidence of the fact that these individuals (who were not witnesses in the instant case) provided assistance to law enforcement agents is neither exculpatory nor relevant on any issue presented by the instant indictment. Moreover, if the defendants seek to offer evidence of the government's investigative techniques, the government would seek to offer evidence to demonstrate 1) the criminal activities of defendants which the government was at that time investigating; 2) its reason for conducting such investigation; 3) the reason such investigative techniques were used; and 4) the results of these investigations. Such a procedure would result in an extensive "mini-trial" on each of these issues which would be wholly irrelevant to any issue properly presented to the finder of fact.

C. Previous Investigations of Defendants

At the trial in Boston, the defendants sought to introduce evidence through cross-examination of government witness to the effect that federal, state and local law enforcement agents had conducted investigations of defendants and related entities for many years. For example, defense counsel repeatedly inquired of the witnesses whether they were aware of specific instances of FBI investigations of members of the NCLC during time periods as remote as 1972; whether or not the various "LaRouche organizations" ever made allegations that such harassment or infiltration occurred or engaged in litigation about such matters; whether or not there were newspaper articles in LaRouche publications to that effect.

Such evidence of previous and unrelated investigations of defendants' activities should be excluded as irrelevant to

any issue on defendants' guilt or innocence on the instant charges. In Boston, the defendants claimed that such investigations began in 1968 and continued throughout the existence of the National Caucus of Labor Committees. Even if this were accepted as true, there is no basis for the introduction at trial of evidence so remote in time to the charges in this indictment.

If the proffered evidence is permitted, the government would seek to show that there was a good faith basis for each such investigation, and that in numerous cases, members of the National Caucus of Labor Committees made *unfounded* allegations of harassment or interference with constitutional rights. *Federal Election Commission v. Committee to Elect LaRouche*, 613 F. 2d 849, 851 (D.C. Cir. 1979), *cert. denied*, U.S. (1980) ("nothing in the record supports or . . . could support any alleged violation of Plaintiffs' . . . statutory or constitutional rights." "Appellants do not challenge directly the District Court's finding of no harassment inasmuch as they concede that their allegations in this regard were unsubstantiated." "The record reveals that appellants in fact never sought to avail themselves of an opportunity to substantiate their allegations. . . ." at 862-63); *Committee to Elect LaRouche v. Federal Election Commission*, 613 F. 2d 834 (D.C. Cir. 1979) *cert. denied*, U.S. (1980) (rejecting argument that FEC investigation was motivated by harassment and concluding, "The Commission, once confronted with these patent irregularities, was warranted, we think, in taking further investigatory action. It was neither unreasonable nor in excess of statutory authority for the Commission, in light of the questions raised by the money orders and cashier's checks about the states in which certain contributors resided, to authorize field interviews of CTEL contributors to verify their donations to LaRouche's campaign." at 847); *LaRouche v. Webster*, 566 F. Supp. 415 (S.D.N.Y. 1983) (The plaintiffs argue that the investigation is in bad faith and intended to chill the exercise of their First Amendment rights. . . . In the present case

there is no question that reasonable cause existed, sufficient to trigger a criminal investigation. . . . For the reasons stated above, this Court finds that the plaintiff's motion to enjoin the Freeman investigation is totally without merit." at 418-19); *Spannaus v. Federal Election Commission*, 641 F. Supp. 1520 (S.D.N.Y. 1986) (rejecting Plaintiff's claims that the FEC's, "enforcement and other regulatory actions against TLC are motivated by bad faith and are interfering with plaintiff's campaign activities and infringing their First Amendment rights." at 1521 "The allegations of bad faith and improper purpose are unsupported" at 1534). *LaRouche v. City of New York*, 369 F. Supp. 565 (S.D.N.Y. 1974)(claim of "psychological warfare" by CIA and NYPD dismissed); *Ghandi v. Police Department of City of Detroit*, 823 F. 2d 959 (6th Cir. 1987) (rejecting NCLC members' claim that the FBI illegally infiltrated the NCLC in the 1970's).

Therefore, the evidence proffered of alleged FBI harassment should be excluded as irrelevant and wasteful of time.

III. Evidence Relating to the Boston Mistrial

On May 4, 1988, the Boston trial in *United States v. The LaRouche Campaign, et al.* ended in a mistrial when, at the request of the defendants, the trial judge excused sufficient jurors for hardship to leave only ten remaining to hear evidence. Because defendants there did not consent to proceeding with ten jurors, the district court found that the mistrial was manifestly necessary.

Defendants in Boston claimed that the mistrial was caused by "government misconduct" calculated to financially bleed the organization. The Boston court has rejected this contention.

Evidence of the fact of the mistrial in Boston, or the reasons for this mistrial are both irrelevant on any issue for the jury to determine, and wasteful of time, and should therefore be excluded.

IV. Conclusion

For the foregoing reasons, it is respectfully requested that the Court enter an Order consistent with the showing made herein.

Respectfully submitted,
HENRY E. HUDSON
UNITED STATES ATTORNEY

Kent S. Robinson
Assistant United States Attorney

John J.E. Markham, II

Mark D. Rasch
Special Assistant
United States Attorneys

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	:	
-vs-	:	CRIMINAL ACTION
	:	NO. 88-243-A
LYNDON LAROUCHE, et al.,	:	
Defendants.	:	

Thursday, November 10, 1988
Alexandria, Virginia

Transcript of motions proceedings in the above-captioned matter.

BEFORE:
The Honorable ALBERT V. BRYAN, JR., Judge
United States District Court

APPEARANCES:
FOR THE UNITED STATES:
KENT ROBINSON, ESQUIRE
Assistant U. S. Attorney
-and-
MARK D. RASCH, ESQUIRE
Special Assistant U. S. Attorney
1101 King Street, Suite 502
Alexandria, Virginia 22314

JOHN J. E. MARKHAM, ESQUIRE
U. S. Department of Justice
P. O. Box 972, Ben Franklin Station
Washington, D. C. 20044

PROCEEDINGS

THE CLERK: Criminal No. 88-234-A, United States versus Lyndon H. LaRouche, Jr., et al.

MR. ROBINSON: Good morning, Your Honor; Kent Robinson, John Markham and Mark Rasch for the United States.

MR. WEBSTER: Good morning, Your Honor.

THE COURT: Good morning. There are a number of motions. I do not intend to hear oral argument on most of them. They are adequately and thoroughly briefed. The ones I will not hear oral argument on are these: for the disclosure of the exculpatory evidence, for disclosure of Rule 404(b) evidence, to dismiss for selective prosecution, the judicial estoppel motions, the motion in limine, the motion to dismiss because of violation of Fifth Amendment right to—Grand Jury abuse, individual Grand Jury voir dire and questionnaire, discovery inspection, bill of particulars, and to dismiss Count I for violation of Speedy Trial Act.

I will hear oral argument on the CIPA motion, the motions to suppress, and for an evidentiary hearing under Franks (phonetic) and the United States against Helt(phonetic), the motion to suppress because of the facial insufficiency of the warrant, and then I will hear oral argument on the Government's motion in limine.

The first motion that I have on my list is the CIPA motion, and Mr. Alcorn, that seems to be your motion.

MR. ALCORN: That's correct, Your Honor.

MR. MOFFITT: Your Honor, there was one motion you didn't mention. I would like to know what the Court's position is on it. It has to do with the attorney-client privilege and

work product. That wasn't mentioned, whether you were going to hear anything on it or not.

THE COURT: I thought that was included in the in limine motion. I do not intend to hear oral argument on the work product, attorney-client matter if it's addressed other than in that in limine motion.

MR. MOFFITT: Your Honor, with respect to that, can I be in a position, at least with documents to supplement that motion, because I am getting more documents with regard to that.

THE COURT: All right. We have been here every Friday — this isn't Friday, of course—since the indictment. It may be that you could spend your time more fruitfully elsewhere, but I can't stop you from supplementing any motion you want to, Mr. Moffitt.

MR. MOFFITT: Thank you, Your Honor.

THE COURT: Mr. Alcorn, I will hear you on the CIPA motion.

MR. ALCORN: Thank you, Your Honor.

Your Honor, last Friday we filed a notice pursuant to the Classified Information and Procedures Act, not a motion per se and under the provisions of the statute which I'm sure the Court is familiar with, the Government has an opportunity to respond as to the matters that are raised in the notice.

This is different than any other CIPA case that I have ever been involved in, in that the defendants are not former Government agents or current Government agents who were given access to classified information while in the employ of the Government. Rather, it is the defendants' contention, supported by admissions by the Government through the

FOIA process that they have been investigated by classified means by the Government.

THE COURT: What is the relevance of their having been investigated?

MR. ALCORN: Your Honor, the indictment—and I think my co-counsel are prepared to address many of the issues in regard to the financial warfare issue.

THE COURT: We have got to address it right now, because the relevance of your CIPA notice depends—I mean the adequacy of your CIPA notice depends in part on the relevancy of the matters you want to go into.

MR. ALCORN: That's correct, Your Honor.

THE COURT: So we are right at the financial warfare issue now.

MR. ALCORN: That's true, Your Honor.

Let me point you to the Government pleadings which have been filed in response to the motions. The first one is the Government's motion in limine, in which they attempt to eliminate, I suppose this type of issue, and on page 2 of that, the Government—and that is titled "Government's motion in limine".

On page 2, the Government concedes that an outside influence that disrupts the belief that repayment could be made could conceivably be relevant. Hence, if the defendants were able to establish some action by the Government which was unknown or unexpected, they might be in a position to show that such an action frustrated their expectation that repayment would be made.

In addition, in another pleading that I found last night, which was the Government's response to the defendants' mo-

tion for exculpatory material, on page 6 of that motion, the Government concedes that actual attacks on defendants which in fact deprived them of financial assistance, raise different issues; and so I think, Your Honor, that we have a concession by the Government that certain types of activities by the Government against the defendants would in fact be relevant to the charges in the indictment. And it is that at which this is addressed.

In fact, the Government states it succinctly in that they state that activities that were unknown to the defendants at the time, which prevented repayment would be relevant. It's precisely those types of activities which we have directed our CIPA notice in an attempt to inform the Court in advance of any untoward development during the trial as occurred in Boston that in fact there are these very voluminous Government files maintained by the counter-intelligence section at the FBI, the counter-terrorism program at the FBI, and in the domestic subversion category in the current period, not dating historically but in the current period '81 to '87, directed at these defendants.

I felt it was better to inform the Court at this time even though we are not in possession of those files and even though we have no rights and no opportunity to invade the Government's right to maintain classified information. It's an area that I feel I cannot even investigate on my own due to the fact of classification.

Basically, we are relying here on the Government and on the Government's good faith to come forward and to explain to us exactly what these —

THE COURT: (Interposing) Doesn't that sort of stand CIPA on its head?

MR. ALCORN: No, Your Honor, I don't think it does if you look at the language. I think the statute was drafted to

deal with all classified information issues. There is a section that relates to discovery, which is Section 4 of the CIPA, which allows the Government if they have to turn something over to us in discovery, to make a submission to you so that you can determine that we are not being harmed in any way by the deletion of any classified information; but I felt that the Government's response to my motion attempted to make the argument that discovery could be denied because classified information was at stake; and that is not the law. It is not the CIPA statute. Section 4 is clear that any discovery that is denied would be substituted by admissions or by statements of fact that are agreed to by the Court, even on an ex parte basis.

The legislative history of the Act is clear that of the criminal law, that in fact, it was an attempt to give the Government a way to deal with cases in which classified information became at issue.

Now, this is not, as some people have questioned, this is not the Oliver North case. We are not attempting to litigate it in the way that the Oliver North case is being litigated. He was a Government agent who was very much in the middle of the mix of classified information. However, that does not deny the fact that we have admissions by the Government that there are large volumes of documents that they have in the classified areas of the Government relating not just to the defendants but to investigations of the defendants during the period in which the indictment has been raised, a concession I would say by the Government of the relevance of this type of material; and I think we are in a position in which we can't ignore what we know on the basis that it may be classified information.

In my view, the Boston case, and I didn't address this in the notice, because I don't think it was proper, but the Government did bring it up in their response.

The Boston case went off track when we had attempted numerous times to obtain information from the Government of this nature, alleging that these investigations existed, that in fact they were relevant to the case. The Boston case went off track when the Government decided in the middle of the trial that in fact information we were developing through a FOIA action did require them to reveal exculpatory information.

The exculpatory information was classified; and that is when the jury was sent out and we began a series of hearings in which CIPA rather than being litigated before the trial, was being litigated in mid-trial. It caused a long delay of that case. It is not fair to this Court, to the defense, or to the Government, to ignore this issue pretrial, when we have an action pending in the District of Columbia under the Freedom of Information Act, in which there will be an imminent release of documents of that nature under the Freedom of Information Act.

The status of that is, we had a status call on the 28th of September in the District of Columbia. They are processing, the FBI is processing these 4,700 documents. They released about 350, which is about this volume, with numerous redactions. I am sure Your Honor is familiar with redacted documents, and with a lot of deletions on the basis of B-1, which is a national security exemption.

I am left in the position where I know that at some point I will receive information of this character through the Freedom of Information Act. It may well cause us to make other demands upon the Government for exculpatory information; and it may well cause the Government to decide that there is information in those files that is in fact exculpatory; and that could happen in the first, second, or third week or other week of a trial of this case.

That is exactly what happened in the Boston case. I think it's not fair to this Court to allow that to occur. We attempted in every way—we filed a CIPA notice in Boston. We filed extensive exculpatory evidence requests in Boston. They were met with the response that we were engaging in an Orwellian fantasy, Your Honor; and when that was disproved, and when the Government became concerned and starting having to give us access to classified information it caused a disruption of the trial schedule, which along with other things of the same nature, ended up in a mistrial.

Your Honor, for that reason, I think that I have properly brought this matter to the Court's attention. I cannot tell the Court by way of the CIPA notice what the information is that is blacked out in a document that is deleted for national security reasons. I just don't have that information. I can't conjecture and guess merely from the context. So what I have done is to state to you what we feel that the evidence supports, and what my investigation of this case has revealed to me.

That is the fact of the existence of large-scale activities of the U. S. Government in investigating these defendants in the areas of counter-intelligence, counter-terrorism, and domestic subversion.

That, I believe, is a fact admitted to by the Government by way of the FOIA responses and by the history of this case.

Your Honor, I feel that—I think that it would be appropriate for the Court to take into account that the FBI director earlier this year, just a couple months ago, found it necessary to discipline six agents of the FBI in the counter-terrorism program in the CISPES Case (phonetic), the Committee in Solidarity with the People of El Salvador. The discipline was imposed for the reason that the program was mismanaged, went extremely broad, infringed upon political activities of

these individuals, and this program was in effect through the years '81 through '84, I think, into early '85.

For that reason, Your Honor, it is not merely to be sensational or to be speculative or to bring conjecture to the Court that I bring to the attention of the Court in light of the history of this case, in light of the disciplinary action imposed by the FBI director recently, the existence of a very extensive file of documents.

In fact, I have knowledge of the file in the CISPES Case and 4,700 pages in this case is a larger file than was released by the FBI under a similar FOIA action in the CISPES Case. From all I know, the scale of what we are dealing with here is larger in the number of documents under the Freedom of Information Act than the CISPES Case.

So I think it is a serious matter and one in which I am not in a position to tell the Court any more, because I am not in possession of the details of the classified program. Nor do I want to be put to the task of attempting on my own to develop the details of a classified program.

I have done what I think I can do, which is point the Court to the public record and to the history of the case, which reveals that there are activities ongoing of a very large scale and that it is a serious issue to be addressed by the Court.

Your Honor, one final thing: my suggestion and what I would ask the Court in relation to this is the rememdy of permitting the defense counsel to examine the files that we have identified. It may require security clearance for defense counsel in order to do so. However, my firm has engaged in a number of actions in which we have been cleared for access to classified information. Other defense counsel in this team have engaged in the process. The Government can do it

quickly if necessary. One of my partners currently has a top-secret clearance with the FBI for legal matters involving the FBI. So it is not out of the ordinary to grant counsel that type of access.

I think given the history of this case, and the Boston case and the history of the Government's relationship to these defendants, that that type of action by the Court would be appropriate to guarantee that these people have an adequate opportunity to develop a reasonable defense to these charges.

* * * *

. . . MR. REILLY: I would like to address the Government's motion in limine. I would like to start by addressing the Court's question, what is the relevancy of harassment to this case? I would suggest there are five bases for finding that the evidence of harassment would be relevant to this case.

First, Your Honor, the Government has alleged extensively in the indictment that there was a series of lulling letters to lenders and that they were made by defendants, the defendants knowing that what they said in those letters were false and saying them with the intent of holding off people from collecting funds.

In every single one of those letters, the letter to Ms. Sexton, the letter from Mr. Spannaus, the letter to Mr. Cains (phonetic), in every single one of them, Mr. Spannaus or Mr. LaRouche say, "We have not been able to repay you because of the financial harassment from our enemies or from those people who are out to stop us from paying. That is the reason we can't repay you."

The Government additionally in its indictment references a memorandum by Richard Welsh, which they argue

was evidence of the state of mind of defendants showing that they couldn't repay.

That memorandum is replete with statements by Mr. Welsh that the reason we can't repay is because of this financial warfare.

The Government wants to argue that those statements were false, and the defendants I would suggest have an absolute right to argue that they were true and that the defendants believed it.

As to this prong, the question, I suggest to the Court is the subjective belief of the defendants. Did the defendants honestly believe what they were saying? Whether they were right or not, and I think we have got a right to introduce evidence showing that there is a basis for the jury to find that when Mr. LaRouche said, "I can't repay you because of financial warfare," he believed it, and it was reasonable, there is a basis for the jury to find that that belief was reasonable.

As I said, that scene runs through the indictment and I suggest will run through this whole trial, that those representations about financial warfare were known by the defendants to be false. It is the center of the defendant's case to prove that when the defendants said those things, they believed them to be true.

Secondly, Your Honor, the Government has argued that money was solicited by defendants with the knowledge that they couldn't repay and knew all along it would never be able to repay.

The defense or one of the defenses to that prong of the Government's case is that the defendants in fact believed they would be able to repay because it was the belief of the defendant that their movement would grow and succeed, that

it was their belief that they would be successful in convincing people to join their organization and that in fact it would take off. And there will be evidence that in 1982 and 1983, they had very good reasons to believe in their own mind that they were about to be successful.

It will be the defense that because of the series of actions taken by people who disagree with Mr. LaRouche, both governmental and private, those expectations were dashed, that the belief, we would argue to the jury, was reasonable and that they could not have expected these things to intervene and prevent their movement from growing. And that, Your Honor, I suggest again right in the middle of the defense of this case, because again the question is when my client, Paul Greenberg, calls somebody and borrows money, does he subjectively believe there is no chance that will be repaid?

I intend to argue, unless the Court tells me I can't, that he did believe it and there was a basis for him believing it, and it was things beyond his control that prevented him and prevented this movement from growing.

Thirdly, Your Honor, there is a question, the objective question of why couldn't the loans be repaid? The Government says the loans couldn't be repaid because the defendants didn't want to. They had the money. They could have repaid it, but they used skewed priorities, to pay for things they shouldn't have paid instead of repaying loans.

The defendants argue they couldn't repay loans because actions like having bank accounts closed down, having the Government seize all their property in October of 1986, having the media publish stories which tended to stop people from supporting them, that was the reason they couldn't repay.

Now, the jury is going to have to decide that issue, Your Honor. The Government says they don't like our argument,

because they are convinced that the truth of the matter is we had the wrong priorities. That is a jury question. In fact, I think it's one of the central jury questions in this case, why couldn't the defendants repay?

It is the defense in this case that the defendants could not repay because of activities that were taken by the Government and by private organizations which they could not expect. It's right in the middle of the case, Your Honor. The Government chose to indict this way. I think the defense has a right to put on a defense.

Fourthly, Your Honor, there is a question of security. In the tax case, the Government has argued that Mr. LaRouche went and hid a lot of his personal income by saying that it was for purposes of security, and it was really for personal income for Mr. LaRouche.

In the loan case, the Government has argued that one of the distorted priorities was that the defendants spent money on the security instead of spending money on the loan payment, which is what they should have done, says the Government.

It is the defense on that whole group of issues about security that Mr. LaRouche and those people around Mr. LaRouche honestly and in good faith believed that they had a very substantial security risk involving physical danger to Mr. LaRouche. There were people out there who wanted to kill him, and that the reason they had to spend this money was not because they would rather do it than repay loans or not because they wanted to hide taxes, but because they had a basis for believing it.

In many instances, the evidence that the defense will introduce, would be that this belief that he had a security threat from people who ultimately turned out to be Govern-

ment agents. That is that somebody working with the Government was feeding information to the defendants saying LaRouche has got a security threat.

The defendants I suggest have a right to argue the story that the defendants had a basis for believing it, that it wasn't just paranoid fantasies or craziness or something they made up so they could not repay loans but they had a basis for believing it.

Again, the Government argues that that can't be right or it doesn't make sense or we don't like it. And they can argue that to the jury, but I don't think, Your Honor, that there is a right to prevent the defense from putting in that defense.

Finally, Your Honor, I think the evidence is relevant to cross examination of several of the witnesses, former members of the organization who have since left and now become unfriendly; it would be the intent to cross examine them on the effect that this type of Government attacks on the organization had on intimidating them and on affecting their decisions to cooperate with the Government.

I think on that prong, it would be relevant cross examination.

To turn, Your Honor, to the specifics of the Government's motion in limine, I think after that introduction, as to some of them, at least personally and I think other counsel don't have any disagreement. For example, it is not my intention to get into before this jury the Emerson involvement or the search warrant, the whole issue that we got involved in up in Boston. There is no reason for that being admissible or relevant that occurs to me. If the Court were to enter an order that says we are not to mention it in our opening, and if for some reason it occurs to us that it is admissible, we are to tell the Court before we ask questions about it or mention

it, I would have no objection. I think no other counsel would have any objection.

I want to make a distinction. I do think Mr. Emerson is relevant to this case. There will be evidence that Mr. Emerson was one of the people who was feeding information to the defendants, telling them they had to be very concerned about security and people were out to get them, and he was getting this information fed from people inside the Government. That type of evidence I think would be relevant, but the specifics of this whole convoluted dispute about what Emerson said to Egan and Klund in September 1986, I don't see any need to put it in. I don't think any of the other defense counsel have any need to get into it.

The Lewis, Howard and Tucker situation is again three individuals who it would be the defendants' claim provided reasons for the defendants to believe that they were threatened.

Secondly, were individuals who there are FBI reports we received were going to other people in the Government suggesting you should not cooperate with these people because they want to hire somebody and kill drug dealers down in Latin America and they are bad people and were basically drumming up opposition that would have the effect of interfering with this organization's ability to prosper and to raise money. So it would be the intention as to those individuals certainly I don't know about opening, but certainly at some point in etiher cross examination or the defendants' affirmative case, I would expect one of us to attempt to introduce evidence about them.

I suggest as to that and as to the—prong of the Government's motion in limine, it really is not the type of thing that is appropriate to a motion in limine, because the issues and the evidentiary questions that they raise are I think very fact

specific. I think it's going to depend on at what point in the case we attempt to introduce it and what form we intend to introduce it. I frankly don't think the record before this Court is full enough to present those issues. So I think in terms of a motion in limine this is not the way to deal with those issues.

As to the bankruptcy, the Government wants to, as far as I can understand, put in everything about the bankruptcy except the fact that they did it.

THE COURT: Does it really make any difference that they did it?

MR. REILLY: I think it does, Your Honor. If the defendants were put into bankruptcy and then are led to believe that the defendants somehow agreed to that or took it as a refuge as Mr. Markham's argument to you and as Mr. Markham in his papers seems to suggest, they were using this as their latest excuse, is the argument of the Government. I think it's very relevant for the defendants to say not only didn't we use that as our latest excuse, but in fact it was this same Government that we would argue has been preventing us from repaying all these years, who put us into bankruptcy. And that was the reason we can't repay.

There will be witnesses on the stand who will testify that they are still owed a lot of money. I think it does make a difference for the defendants to say that they haven't been repaid because the organizations are in bankruptcy, not because the defendants wanted to be in bankruptcy, but because the Government put them there.

I think secondly, Your Honor, on the bankruptcy, the Government has argued that they want to put in the substance of why they went into bankruptcy. That matter has not been resolved. There was a substantial evidentiary hearing before

Judge Bostetter in May of this year. His opinion is still pending, and it has not been adjudicated, that this was an appropriate action by the Government or that the defendants were appropriately put into bankruptcy.

I think as a factual matter, that predicate of the Government's argument just at least at this point doesn't exist. That is still pending before Judge Bostetter. He has not issued his opinion.

Finally, Your Honor, the Government has kind of a general catch-all category about previous investigations of the defendants. I think I have covered that in my general argument. I don't think you can rule at this point just in general about previous investigations. I think they are very relevant. I think it's the middle of the defense of this case that there are reasons and explanations for why these loans weren't repaid and that the defendants had a good-faith belief when they made those representations to people.

I would ask the Court to deny the motion in limine.

MR. MOFFITT: Your Honor, may I address the motion in limine just very briefly?

THE COURT: Yes, sir.

MR. MOFFITT: Your Honor, the record in this case and the other part of the motion in limine I want to address to these matters is part and parcel of the information that was acquired in the Boston case. I would suggest to you, Your Honor, that in the Boston case the Government took the position that the defendants, the organizations and the individuals involved with the National Caucus of Labor Committees believed information that was furnished by Roy Frankhouser and Forrest Lee Fick (phonetic).

From approximately 1975 to 1986, Roy Frankhouser furnished information to these accused regarding information concerning financial warfare, the Government's involvement with financial warfare, why certain events occurred, what their responses ought to be to certain events. That was the position of the United States Government in Boston, and the further position was —

THE COURT: This is part of your judicial estoppel argument.

MR. MOFFITT: But it works as to this motion in limine, Your Honor, because if the Government is arguing in one Court that they believed these individuals, and clearly the Government has taken that position, my client, Dennis Small, the fundraiser, who is on the telephone making statements to people based upon information furnished to the National Caucus of Labor Committees by Roy Frankhouser, which the Government has conceded it believed regarded financial warfare or the fact that the Government was acting in such a way and behaving in such a way to prevent them from doing certain things, is relevant to his state of mind.

To say on the one hand that they believed these individuals, and now take the position that this is not particularly relevant belies even the cases that they cited in the memorandum. If you look at United States v. Henderson, which is a case they cited as being very similar to this case, the people who were raising money at that particular point had a pecuniary interest in the money being raised, they were being paid. My client does not. This was a political organization, and much of the information involved in the solicitation was political and based on information that was furnished to them by these consultants, which Government has contended all along was believed by the various organizations.

* * * *

. . . MR. ALCORN: Your Honor, if I could just briefly rebut on the CIPA issue. I think that the Government's response did not go into the substance as much as their pleadings have.

Your Honor has asked the question, or has stated that you think it would be appropriate to introduce evidence on why the defendants said what they said. And in the context of the lulling letter we have the issue of the statement that Government harassment, the Government activities had reduced the ability of the defendant to pay. And I think, Your Honor, that if the Government as they have in the indictment claimed that the lulling letter was false, they have put in issue those statements that are contained in the letter.

Your Honor, I think that the situation is revealed by the facts of the Government admissions are that there are activities, voluminous Government activities occurring in the classified context, investigations of these defendants during the time periods alleged by the indictment. The defendants have often raised the issue and pointed to those activities. And I do not think that the Government can be allowed to say that their belief that those things were happening was a false belief, or a ridiculous belief, and ignore the fact of this voluminous documentation which we found under the Freedom Of Information Act, that in fact activities were occurring in that realm.

I think that in light of the argument today that the issues that the Government did not address in relation to that mound of documentation, those activities, it is our right to have access to that in some way. I do not think the defendants can have a fair trial on this indictment in light of these issues unless we have access to know what the Government was conducting against them in those investigations in that context. Government did not address our request that we be granted access and that the Government make arrangements

for us to achieve access. I think on these facts we are entitled to that to prepare a defense to this indictment. I would renew my request in that regard.

THE COURT: Any other defendant want to be heard?

MR. ANDERSON: Two brief points: first, essentially in support of the argument that Mr. Reilly made, the five points he enunciated to relevance in response to the Government's motion in limine. This argument also addressed by indirection our request for exculpatory evidence. And I say this, Your Honor, that the Government doesn't charge in its indictment that there was no intent to repay loans taken at any point. They say and allege there was a scheme which involved an intent not to repay according to the terms of the note, the terms of the obligation, or the terms of the representations, among other things. And in fact any adversive activity from whatever source which affected even for a brief period of time the financial resources of the entities who held the obligaton or the larger scope of entities is in fact relevant to the intent to repay according to the terms of the obligations at the time that was made. I think even a very temporary adversive action or adversive result from an attack of one kind or another is extremely significant.

Finally, Your Honor, on a different point: I feel to some degree compelled to say I have the feeling that I am in a time machine, rushing toward November 21st. I feel I have not had the time to prepare adequately on my client's behalf for the filing of motions. I have not had adequate time to prepare for the argument of the motions. I haven't in fact read all of the Government's responses because of their late arrival and the short amount of time, and my requirement of at least a few hours sleep a night.

I feel even more troubled by the fact that, given the November 21st trial date, that I have not had adequate time

to prepare for trial and will not be able to adequately defend my client on a trial beginning on that date, and that I if no one else require more time to prepare.

MR. REILLY: Your Honor, I join in those remarks by Mr. Anderson.

MR. MOFFITT: I do too, Your Honor.

MR. CLARK: Likewise.

MR. WILLIAMS: I do too, Your Honor.

MR. GETTINGS: Your Honor, may I address one point in rebuttal to the motion in limine?

THE COURT: Yes.

MR. GETTINGS: Your Honor, I only want to speak to the issue of what difference does it make who forced the bankruptcy. In other words, whether or not we would be entitled to or it would be put in by whoever puts the evidence in, because I am not clear whether the motion in limine is directed to the Government's affirmative use of the bankruptcy or our use of the bankruptcy. I think that might have something to do with the answer to the question as to whether it would come in, whether the Government is seeking to put in the bankruptcy or whether we are.

But, getting over that, I would just like to point out that if it is not disclosed who instigated the bankruptcy, I think it would be terribly misleading to a jury. I think a lay person, and I don't know a whole lot more about bankrputcy, quite frankly, than the average lay person. They kind of look at it as something that is a voluntary act on the part of the person who owes the money to kind of in the worst sense to get out of paying, and in the more benign sense to get his head above

water and to try and go foward. But they tend to think that that is what causes most bankruptcies, and that is not what happened here. Or they think that creditors force it sometimes, if they are a little more sophisticated in their knowledge. That is what happened here, but it was not a bunch of creditors who were lenders who got together and forced the bankruptcy. It was the Government seeking to enforce the contempt fines.

So the bottom line is, I think it would be, to stay silent on this subject would be misleading. For no real good reason, because it is the truth after all that the Government did instigate the bankruptcy. I don't see any reason for withholding that from the jury.

* * * *

THE COURT: All right.

I will let counsel know my ruling on the motions promptly, but I think I have heard nearly all that there can be to be said.

MR. WEBSTER: Your Honor, I would object —

THE COURT: (Interposing) Mr. Webster, I don't like to cut you off. The first time you haven't had something to say. I don't want you to feel —

MR. WEBSTER: I just have a couple matters, Your Honor. I will lose my voice if I don't make this point now. But I would like to note an objection to not having oral argument on all the motions. And the reason that I do object and I understand Your Honor's ruling, and of course will abide by it.

THE COURT: Well, oral arguments are a luxury that a lot of Courts don't allow at all.

MR. WEBSTER: Well, in this case, Your Honor, again there are some 25 motions before the Court. Many of them I haven't had a chance to think through or participate in the production of. And that is true for all counsel. Many of them I haven't had a chance to read the Government's oppositions because it came tumbling in the last couple of days under the schedule set up by the Court. There is a great danger here several important points could be lost by the Court with this tremendous flow of massive material that we haven't even among ourselves had a chance to coordinate and cooperate. Each of these motions, as Your Honor knows, are set up in such a way as could be submitted on behalf of all defendants with the signature of one counsel. But it means that one counsel is generally preparing it and not having a chance to coordinate.

I have only been in the case 18 days. That is an awful lot of motions. We have had five before today. They have been very serious ones. I just feel that the pressures of meeting deadlines have caused us to sacrifice our ability to adequately represent our counsel, and that there is a danger by not having oral arguments that there will be points lost on the Court.

I know Mr. Moffitt has some important factual matters. I know we had some important points on the bill of particulars. I know there are a lot of points I would like to be made on discovery. I feel we are not having an adequate opportunity to ensure that the Court adequately balances and addresses all of the issues here.

* * * *

APPENDIX L

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA	)	
	)	CRIMINAL ACTION
-vs-	)	NO. 88-243-A
LYNDON LAROUCHE, et al.,	)	
Defendants.	)	

O R D E R

Upon consideration whereof, the court makes the following rulings on the defendants' motions submitted and heard this day:

A. As to the motions filed jointly by all defendants, it is hereby ORDERED that:

1. The motion for disclosure of exculpatory information is denied. For the reasons set out in the decision on the government's motion in limine, the discovery matters concerning the infiltration, harassment and financial warfare are irrelevant to the charges contained in the indictment, nor is the belief that the government was "out to get them." The discovery already provided the defendants by the government is more than adequate.

* * * *

9. The motions of the defendants for individual voir dire of the jurors and to submit a questionnaire to the jury panel

are denied. The court's questioning of the panel can adequately insure an impartial panel, and the court will, of course, consider any specific questions submitted in a timely manner by counsel which counsel desire to have the court ask.

10. The motion of the defendants for discovery is denied. The court concludes that the defendants have been furnished all the discovery required under F. R. Crim. P. 16. The court will order no more.

* * * *

F. Insofar as the motion in limine of the United States and the related Notice of the defendants pursuant to Sec. 5 of the Classified Information Procedures Act (CIPA), it is

ORDERED that the motion in limine of the United States is granted to the following extent only:

Reference to the bankruptcy proceedings as a reason for non-payment of the loans which are the subject of the indictment will be permitted; that the bankruptcy was an involuntary one, *i.e.*, at the instance of other creditors, will be admissible; that the government was the creditor which initiated the involuntary bankruptcy proceeding will not be admitted because the court, pursuant to F. R. Evid. 403, concludes that admission of testimony that United States was the petitioning creditor would necessitate inquiry into the nature of the debts owed the United States as a result of contempt proceedings, and would divert the jury from the issues raised by the indictment.

2. Evidence as to other FBI or law enforcement activities, use of informants (other than possible impeachment should the informant testify), FBI infiltration, intelligence or security activities directed at the finances and political activi-

ties of persons and organizations associated with LaRouche will not be admitted, except that the defendants may show that there were unexpected actions by some outside influence, including the government, which had the effect of frustrating their expectation that repayment would be made. Even then the court will not allow a delving into any details of alleged infiltration, financial warfare, etc., for the reason that under F. R. Evid. 403, this would divert the jury from the issues raised in the indictment.

For those same reasons, the notice under Sec. 5 of CIPA is insufficient to invoke the further procedures outlined in that Act.

In connection with the motion in limine, the court recognizes that circumstances may develop at trial which renders admissible evidence which at this point does not appear to be so; consequently, this ruling is not written in stone, although counsel are admonished not to mention the matters covered in this ruling in their opening statement.

Albert V. Bryan
United States District Judge

Alexandria, Virginia
November 10th, 1988

Supreme Court, U.S.
FILED
JUN 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1285

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LYNDON H. LAROUCHE, JR.,
WILLIAM WERTZ, EDWARD SPANNAUS,
MICHAEL BILLINGTON, DENNIS SMALL,
PAUL GREENBERG and JOYCE RUBINSTEIN
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF RONALD THOMAS SPANN AMICUS CURIAE IN SUPPORT OF PETITIONERS' WRIT OF CERTIORARI

RONALD THOMAS SPANN
Former Chair Human Rights Committee of American Bar Association
Ronald Thomas Spann & Associates, P.A.
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QUESTION PRESENTED

In a complex case involving multiple and highly controversial defendants, did the trial court violate the petitioners' constitutional right to present a defense to the charges against them, when the trial court:

(1) rushed the defendants to trial 38 days after indictment, repeatedly denying their motions for a continuance of the trial date and thereby denying them adequate time to prepare a defense;

(2) denied defendants' motion for disclosure of exculpatory information and quashed a subpoena for specifically-identified FBI documents which defendants asserted would support their theory of defense; and

(3) granted a government motion *in limine* which barred admittedly relevant evidence concerning government harassment, financial interference and a government-initiated involuntary bankruptcy proceeding, thereby excluding a major portion of defense evidence and preventing the defendants from presenting their defense to the jury on an equal basis with the prosecution?

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INTEREST OF AMICUS

As the former Chair of the American Bar Association's Human Rights Committee who has an abiding interest in the principles of equity and justice your amicus, Ronald Thomas Spann, is concerned that the procedure followed by the district court and endorsed by the Court of Appeals in this case sets a dangerous precedent in violation of the basic tenets established by our Constitution for the protection of all accused. This amicus brief is submitted with the consent of all parties.

FACTUAL STATEMENT

This case involves a four-time minority presidential candidate and six of his associates, who had been the subjects of years of intensive investigation by the FBI and other agencies. They had also been the subjects of widespread and generally hostile pretrial publicity.

Three of the seven defendants—including Lyndon LaRouche—had previously been indicted by a federal grand jury in Boston during the period from October 1986 to June 1987. After lengthy pretrial proceedings, a trial commenced in Boston in December 1987. The trial was interrupted for weeks of hearings on classified information and government misconduct[1] and a mistrial was declared on May 4, 1988. The prosecutors vowed to retry the case, and a retrial was scheduled. While the Boston retrial was pending, the U.S. Attorney's Office for the Eastern District of Virginia obtained indictments of Mr. LaRouche and six associates in that district. The two Boston prosecutors subsequently joined the Virginia prosecution team.

The Virginia indictment was issued on October 14, 1988, and arraignment was held, on Monday, October 17. At arraign-

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[1] *U.S. v. The LaRouche Campaign, et. al.*, 695 F Supp 1265 (Dist. Mass. 1988); *U.S. v. The LaRouche Campaign, et. al.*, 695 F Supp 1290 (Dist. Mass. 1988); *U.S. v. The LaRouche Campaign, et. al.*, 695 F Supp 1283 (Dist. Mass. 1988).

ment the court set a schedule calling for pretrial motions to be submitted by November 7, argument on the motions on November 10, and trial to commence on November 21. When the government objected to having only two days to respond to motions, the court indicated its attitude toward pretrial motions:

> ". . . 90 percent of these motions are going to come out of the word processor. . . . You have seen them before, and I have seen them before." (Tr. Oct. 17, 1988, p. 8.)

On October 28, counsel advised the court that they might have difficulty with the trial schedule; the court conceded that it was "pushing the defendants a bit hard on this case on time." (Tr. p. 12.) On November 4, counsel moved for a 60-day continuance, pointing to the complexity of the case, that it involved "a warehouse full of documents," hundreds of hours of consensual tape recordings, and witnesses all across the country. The court denied the motion.

Pretrial Motions

Despite the incredible time pressure a substantial Motion for Disclosure of Exculpatory Material was filed. This was extremely specific as to the facts of this case. It contained 182 separate requests for information in the government's possession including:

(1) information which would tend to refute the government's characterization of the NCLC (the philosophical association founded by LaRouche) as a criminal enterprise and a global conspiracy.

(2) evidence of harassment of defendants and their organizations, and of financial interference which impaired their ability to repay loans.

(3) the role of government agencies in the campaign of derogatory media coverage which diminished defendants' public support and fundraising ability.

(4) direct interference by government agencies into the political and financial relationship between defendants and various contributors and lenders.

(5) efforts within the government to discredit defendants' influence within the Reagan administration and their access to administration officials.

(6) improper targeting of defendants for law enforcement investigation by political enemies of defendants within law enforcement and intelligence agencies.[2]

Defendants also submitted a Notice pursuant to the Classified Information Procedures Act (CIPA), 18 U.S.C. App. Sec. V, giving notice that they reasonably expected to cause disclosure of the "existence and operational details of United States government counterintelligence, counterterrorism or domestic security activities directed at the finances and political activities of persons and organizations associated with defendant LaRouche in the United States and other countries." They noted that the FBI had acknowledged the existence of approximately 4,700 pages of documents, all but 350 of which were being withheld on national security grounds. The CIPA Notice stated that defendants believed that these FBI documents, and others, would show that beginning in 1983, elements within the United States government began activities to disrupt the financial and organizational support of LaRouche political causes and activities, and it gave some examples from already-disclosed documents. (Defendants also attempted to subpoena the cited 4,700 pages of FBI documents for trial, but on two occasions the trial court denied access to the documents.)

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[2] These requests were not just speculative. The defendants had obtained, through FOIA and civil discovery, personal correspondence from Henry A. Kissinger to FBI Director William Webster, urging an FBI investigation of defendants; a 1986 NSC telex message between Iran-Contra defendants Richard Secord and Oliver North which referred to "gathering info against LaRouche." Other similar documents were also cited.

Government Motion in Limine

One day before pretrial motions were to be argued, defense counsel received copies of a motion *in limine* filed by the government. The government candidly asserted its determination to cut off defendants' ability to present their planned defense:

> "The defendants have indicated that they intend to defend this case by claiming vindictive prosecution, harassment by the government, and that their inability to repay loans was due to 'financial warfare' brought against them by the government. . . . This matter should be resolved prior to trial lest this case begins with claims by the defendants—as they did in Boston—that they intend to prove a 17-year pattern of harassment and persecution of their organization at the hands of the FBI.

The government's concerns about a repeat of the Boston trial were not without foundation. After five months of trial there and the declaration of a mistrial, the jurors took an informal poll among themselves, and voted to acquit all defendants on all charges. "There was just too much question of government misconduct in what was happening to the LaRouche campaign," one juror was quoted as saying. (*Boston Herald*, May 5, 1988)

The prosecution's motion *in limine* first addressed the matter of the involuntary bankruptcy proceedings which the government itself (operating through the U.S. Attorney for the Eastern District of Virginia) had instituted against three publishing companies operated by associates of the defendants. Upon an *ex parte* motion brought by the government, the Bankruptcy Court had issued an order appointing interim trustees and directing the seizure of the three companies by U.S. Marshals. On April 21, 1987, Marshals did raid and padlock offices of the companies; they never reopened for business again.

The prosecution's motion *in limine* conceded that the bankruptcy seizure was relevant to show that after April 1987, the

companies were neither able to borrow additional money or repay any lenders.[3] However, the government proposed, "No evidence should be allowed relating to the fact that the bankruptcy was initiated by the United States or the fact that the United States Marshals Service padlocked the business[es] . . ."(Government Motion *in Limine*, p. 13.)

On November 10, the court summarily denied all substantive defense motions, while granting the government's motion *in limine*. The order stated, *inter alia*:

> "The motion for disclosure of exculpatory information is denied. For the reasons set out in the government's motion *in limine*, the discovery matters concerning the infiltration, harassment and financial warfare are irrelevant to the charges contained in the indictment, nor is the belief that the government was 'out to get them.' " (sic) (Order, Nov. 10, 1988, p. 1.)

The trial court granted the government's motion *in limine* to the following extent:

> "1. Reference to the bankruptcy proceedings as a reason for non-payment of the loans which are the subject of the indictment will be permitted; that the bankruptcy was an involuntary one, . . . will be admissible; that the government was the creditor which initiated the involuntary bankruptcy proceedings will not be admitted . . .
>
> "2. Evidence as to other FBI or law enforcement activities, use of informants (other than possible impeachment should the informant testify), FBI infiltration, intelligence or security activities directed at the finance and political activities of

[3] In fact, all borrowing by the three companies had ceased prior to this, so the principal effect of the government's bankruptcy proceeding was to prevent the companies from obtaining any further revenues through sales and contributions, and bar them from repaying any loans.

> persons and organizations associated with LaRouche will not be admitted, except that the defendants may show that there were unexpected actions by some outside influence, including the government, which had the effect of frustrating their expectation that repayment would be made. Even then the court will not allow a delving into any details of alleged infiltration, financial warfare, etc., for the reason that under F.R. Evid. 403, this would divert the jury from the issues raised in the indictment." (Order, Nov. 10, 1988, p. 7-8.)

Denial of Continuance

Defense counsel renewed a motion for continuance to the district court on November 16, citing the denial of all defense motions, and the granting of the government's motion *in limine*, concluding that these developments "have demonstrated the district court's reflexive drive toward an unreasonable trial date . . . which would have unavoidably required a delay in the trial date; and have resulted in a severe narrowing of defense options that has totally disrupted planning of the defendants' case . . ."

Attorneys' affidavits attached to the renewed motion averred that the court's granting of the *in limine* motion drastically affected their ability to be ready for trial on November 21. Mr. Williams, counsel for Joyce Rubinstein, stated:

> As a result of the District Court's Order of November 10, which essentially eliminated almost all of the defense's affirmative defense . . . counsel had been compelled to re-evaluate and begin to revamp defendant Rubinstein's case.

Mr. Webster, counsel for defendant Spannaus, set forth a range of tasks that he had been unable to perform—including review of specific evidence, and interviewing of witnesses. Mr. Moffitt addressed the problem presented with defending his client, defendant Small:

> As a result of the Court's ruling on the government's Motion in Limine, as counsel for Dennis Small, I am now required to retool and revise my defense in one week's time. . . . As an officer of this Court, I aver that there is simply no way that I can adequately prepare for trial on November 21, 1988 and provide Dennis Small effective assistance of counsel in accordance with the Sixth Amendment of the United States Constitution . . . [And] as a result . . . a conviction is inevitable if forced to trial on November 21, 1988.

At a motions hearing on November 18, the Court denied the renewed motion for continuance, with a lecture admonishing counsel that it would hear no "more wailing and moaning and carrying on and bellyaching about why I can't be ready for trial." (Tr., Nov. 18 p. 4-5)

Trial commenced on Monday morning, November 21, although counsel answered "not ready" when the case was called. *Voir dire* was concluded, and a jury selected, in less than two hours despite intense adverse pretrial publicity. The lack of time to prepare resulted in serious deficiencies in the ability of defendants both to contest the government's case and to present their affirmative defense. The defense was unable to interview most of the 53 listed government witnesses or to adequately investigate their background and involvement with defendants. Defense counsel were unable to adequately review and assimilate *Jencks* material (1,500 pages), Rule 16 material (9 file drawers), audio tapes (over 100), or government trial exhibits (almost 700 separate exhibits). Consequently, they were unable to adequately cross-examine and/or impeach the government witnesses and rebut much of the government's evidence.

The defense was equally hampered by the lack of time to prepare its own case. No defendant took the stand in his or her own behalf, although four of seven had planned to testify as reflected on the defendants' witness list provided to the prosecutors. Defendant testimony would have been particularly impor-

tant, since much of the government's case was based on statements attributed to defendants and material omissions, allegedly made by them in the course of soliciting loans. On December 16, the jury returned guilty verdicts on all 48 counts of the indictment. On January 20, 1990, the Fourth Circuit Court of Appeals affirmed the convictions. On February 5, 1990, Petitioners filed a request for rehearing with a suggestion for rehearing *in banc* which was denied on February 16, 1990.

SUMMARY OF ARGUMENT

Petitioners' case raises important questions of constitutional law and the right to a fair trial.

In our system of justice, there is no right more important than trial by jury. It is the citizen's protection against arbitrary and vindictive law enforcement and abuse of power by government. Yet the right to trial by jury is an empty formality unless an accused can present his full defense to the jury, on an equal footing with the prosecutor.

In the case at bar, the defendants were denied their right to defend themselves. The trial court, through discovery and evidentiary rulings, precluded major parts of the defense case and prevented the defendants from presenting and developing their theory of defense and the facts on which it was based. The trial court also rushed the defendants to trial with such haste that they were unable to adequately prepare their defense case. The trial court not only violated defendants' constitutionally protected right to defend, but it usurped the fact-finding function of the jury. By prejudging the factual basis of the defense, the court prevented the jury from hearing the facts on which it could base its determination of guilt or innocence.

Additionally, because of the widespread perception of injustice created by the conduct of the trial, this case raises questions about the integrity of the judicial system and public confidence in that system.

REASONS FOR GRANTING THE WRIT

I. PETITIONERS WERE DENIED THEIR RIGHT TO PRESENT A DEFENSE AND TO HAVE THEIR CASE DECIDED BY THE JURY.

A case such as this one reminds us of why trial by jury is so fundamental to our system of criminal justice. We tend to take trial by jury for granted, but it is important to recall that trial by a jury of citizens was developed as a protection against arbitrary and politically-motivated prosecutions. These reasons for trial by jury are as important and relevant today as they were two centuries ago:

> "Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to higher authority. The framers of the constitutions strove to create an independent judiciary by the insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. . . . Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence." *Duncan v. Louisiana*, 391 U.S. 145 (1968).

The defendants, here, made it clear that they believed it to be a politically-motivated prosecution. Yet there need not be any special procedures for a "political" case: the jury system, properly used, should be in itself sufficient protection for an accused against a "corrupt or overzealous prosecutor" or a "compliant, biased, or eccentric judge." But for the jury system to work, a number of elements need to be present which were absent here. The accused must first of all be assured that a fair and impartial

jury is selected to hear his case. Secondly, he must be allowed to present his defense, his explanation, to the jury, with all the relevant facts and witnesses. Finally, an accused must be given sufficient time to prepare his case—otherwise the right to have a jury hear his case is a meaningless formality.

The Bill of Rights, with its Fifth and Sixth Amendment provisions for criminal procedure, was adopted as a protection against the abuse of power by government. *Barron v. Baltimore*, 7 Pet. 245 (1833). It would indeed be naive to think that such abuses of power cannot happen today, and that therefore the courts can be less vigilant about enforcing those protections. Yet, the trial court in this case clearly took the view that the goals of efficiency and expedition in the administration of the court's docket took precedence over a conscientious protection of the rights of the defendants to a fair trial.

How else could the court have inflexibly adhered to a schedule of sending the defendants to trial five weeks after arraignment in a highly complex mail fraud and tax fraud case involving over 500 government exhibits, 53 witnesses, and millions of documents? How else could the court have set a trial schedule which virtually *required* that all pretrial motions be denied? How else could the court have cut the heart out of the defense case ten days before trial on the grounds that the issues raised, although relevant, would "divert" the jury? And how else could the court have seated a jury in less than two hours in a case involving such massive and prejudicial pretrial publicity?

The specific acts of mail fraud charged against all seven defendants involved the solicitation of loans from their political supporters with the intention not to repay. At trial, the government repeatedly elicited evidence on nonpayment of loans as proof of such criminal intent. The defendants clearly intended to defend against these charges by showing that their capacity to ensure repayment was impaired by disruptive actions taken by the government and other third parties. Defendants' Motion for Disclosure of Exculpatory Material and its supporting Memorandum "telegraphed" this defense strategy. [See Petitioners' Appendix, A-165]

Defendants apparently regarded the most important disruption to be the unprecedented involuntary bankruptcy proceeding brought by the government against three publishing and distribution companies (including the company which held all the loan obligations at issue in the indictment, Caucus Distributors, Inc.). More than a year before the indictment issued the U.S. Attorney for the Eastern District of Virginia had obtained an *ex parte* order directing U.S. Marshals to seize the offices of the three companies on behalf of court-appointed Interim Trustees. The companies were raided and padlocked on April 21, 1987, and never reopened their doors. They were unable to raise any revenues or pay any creditors after that date.[4] At trial, the defense did show that, prior to the bankruptcy shutdown, substantial repayments were being made. But under the terms of the court's *in limine* ruling, they could not tell the jury that the United States government had initiated the bankruptcy seizure. The jury was allowed to learn that there had been a bankruptcy proceeding, but without knowing that the government commenced it, they might conclude that it was either an effort by the debtor companies to avoid paying their debts, or was caused by disgruntled lenders. Through the combined effects of the court's evidentiary rulings and the rush to trial, these defendants were denied the most fundamental right possessed by an accused: the right to defend themselves against charges brought by the government.

A. The Right to Defend Is Constitutionally Protected

The Bill of Rights provides specific protections to a person accused of a serious crime: due process of law, trial by jury, compulsory process to obtain witnesses in his favor, the right to

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[4] On October 25, 1989, the U. S. Bankruptcy Court dismissed the government's petitions, on grounds that the government had unlawfully invoked the court's jurisdiction. The court also held that two of the three alleged Debtors (including Caucus Distributors) were ineligible to be the subjects of an involuntary petition because they were non-profit, eleemosynary institutions. The Court ruled that the government had filed the petitions in "objective bad faith" and had perpetrated a "constructive fraud" on the court. This ruling however, was not before the Court of Appeals when it decided this case. *In re Caucus Distributors, Inc. et al.*, 106 B.R. 890 (Bkrtcy.E.D.Va. 1989).

confront adverse witnesses, and the assistance of counsel. Implicit in all of these specifically enumerated rights, and subsuming them all, is the right of an accused to present his defense in a court of law.

It was not always so. The progression from an inquisitorial system to an adversary system of justice spanned many centuries in English law.[5] It was not until the 18th century that a defendant in England had an equal right to present his case through witnesses. By the mid-17th century, a defendant could call witnesses, but he still lacked two advantages that the Crown did have: he couldn't compel witnesses, and he couldn't have them sworn.

Developments in the American colonies followed a similar course in the 17th century, but during the 18th century, many of the colonies put pro-defendant reforms into effect. By the mid-18th century, a defendant could subpoena witnesses and place them under oath in a number of the colonies. During the Revolution, the new states adopted their own Bills of Rights, which while containing different points of emphasis, all established the principle that a defendant should have the opportunity to present the essential elements of his case on terms equally advantageous to that of the prosecutor.[6]

The compulsory process clause of the Sixth Amendment was included in the Bill of Rights to provide for the calling of defense witnesses; an analysis of the circumstances of its drafting leads to the conclusion that its purpose was to guarantee a defendant's right to present evidence on an equal basis with the prosecution. One scholar suggests that the Framers intended "to remove all obstacles then extant to the ability of the accused to fully and fairly defend himself against criminal accusations."[7]

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[5] Paul Westen, "The Compulsory Process Clause," 73 *Michigan Law Review* 71 (Nov. 1974), p. 78f.

[6] *Id.*, at p. 94-95; cited in *Taylor v. Illinois*, 484 U.S. 400 (1988).

[7] Robert Clinton, "The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials," 9 *Indiana Law Review* 711 (April 1976), p. 738.

Up until recent decades, the trend of events since the adoption of the Bill of Rights was generally to place new obstacles in the way of a defendant's presentation of his defense.[8] The codification of criminal procedure and rules of evidence often operated to exclude evidence favorable to the defense. Increasing jurisprudential rigidity and formalization created new problems, often limiting a defendant's ability to fully present a defense.[9] The constitutional right to defend in criminal cases was not directly addressed by this Court until the 1960's. Previously, in the 1870's, the Court had recognized—in a civil case—the right to be heard; that ruling was based on due process grounds.

> "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. *Windsor v. McVeigh*, 93 U.S. 274, 277" (1876).

In a pair of cases dealing with summary contempt procedures, this Court clearly recognized that defendants have a constitutionally protected right to present a defense against criminal charges. *Cooke v. United States*, 267 U.S. 517 (1925); *In re Oliver*, 333 U.S. 257 (1948). The 1967 case *Washington v. Texas*, 388 U.S. 14 (1967), presented the problem of the right to defend in its most common form. The issue was the conflict between an evidentiary rule and the accused's efforts to introduce exculpatory evidence. That ruling has immediate bearing on the case at bar:

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[8] By contrast, Chief Justice John Marshall's handling of the Burr trial is remarkable for its broad construction of the compulsory process clause, and his generally expansive reading of the rights of a criminal defendant. *U.S. v. Burr*, 25 F.Cas. 30 (No. 14,692d)(C.C.Va. 1807); *U.S. v. Burr*, 25 F.Cas. 187 (No. 14,694)(C.C.Va. 1807). Marshall extended the subpoena power to include access to papers as well as a witness' testimony. *Id.* at 35. He did not demand specific proffers of relevance or materiality, recognizing that this would force premature disclosure of the defense case. *Id.* at 36. Moreover, he allowed the defendant to subpoena evidence in his favor prior to trial and even during the grand jury stage. *Id.* at 33.

[9] *Id.*, at p. 739-741.

> "The right to offer the testimony of witnesses, and compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Id.*, at 19.

In *Chambers v. Mississippi*, 410 U.S. 284 (1973), this Court asserted clearly that there exists a due process right to defend, and held that a mechanical interpretation of rules of evidence cannot be used to exclude evidence bearing on the guilt or innocence of a party.

> "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Id.* 294.

In recent years, this Court has reiterated that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), citing *California v. Trombetta*, 467 U.S. 479, 485 (1984). The defendants in this case were denied the right to use the process of the court to obtain evidence which they considered to be exculpatory. They were also denied the right to confront and cross-examine the evidence against them, through the limitations imposed by the *in limine* order.[10] They

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[10] One commentator has noted what he calls an "alarming trend in the use of the motion *in limine*":

> Prosecutors have begun filing broad pretrial motions *in limine* to prevent entire defenses from ever being heard, much less considered, by a jury. These motions are appearing more commonly in

were also denied their right to prepare and call their own witnesses (including some of the defendants themselves) by the rush to trial and the ensuing lack of time to prepare—all in violation of their constitutional right to defend.

B. The Rush to Trial Violated The Right to Present A Defense

Petitioners have argued that the denial of a continuance by the trial court violated their Sixth Amendment right to effective assistance of counsel. Your *amicus* suggests that the denial of a continuance and the rush to trial also violated petitioners' constitutional right to defend, and urges this Court to consider the issue on this additional ground.

In his analysis of the right to present a defense, Professor Clinton suggests that problems due to lack of pretrial preparation should not be analyzed only as matters of assistance of counsel. Analyzing lack of preparation time only in terms of assistance of counsel "foists upon the accused the rather heavy burden of proving that defense counsel were ineffective, under the rigorous tests which courts usually apply to such claims."[11]

The Speedy Trial Act, 18 U.S.C. 3161 *et seq.*, sets a minimum of 30 days before trial can commence, from the date a defendant first appears with counsel. Continuances well beyond the statutory maximum of 70 days may be granted when "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. 3161 (h)(8)(A). Among the factors to be taken into consideration are:

> politically sensitive trials. . . . In this highly unorthodox use of the motion, prosecutors are asking trial courts to rule upon the appropriateness of an anticipated defense before the trial ever begins and before the government has presented any witness testimony, much less sustained its burden of proof.

Douglas L. Colbert, "The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial," 39 *Stanford Law Review* 1271 (July, 1987).

[11] *Supra*, Clinton, pp. 850-851.

> "(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself with the time limits established by this section." 18 U.S.C. 3161 (h)(8)(A)(ii).

This case was clearly a complex one with novel issues of law (such as the charging of defendant LaRouche with a "Klein" conspiracy to impede the IRS, combining that charge with the mail fraud counts against all defendants, and the unique and totally unprecedented government-initiated bankruptcy). Yet the defendants had only 34 days to prepare from the date of arraignment. This, in and of itself, constituted a violation of defendants' right to defend themselves.

C. The Trial Court Usurped The Fact-Finding Function Of The Jury

In petitioners' case, the trial court excluded crucial evidence on two somewhat contradictory grounds. Discovery as to "infiltration, harassment, and financial warfare" was denied as "irrelevant" to the charges.[12] On the other hand, the court's order granting the government's motion *in limine* was based on Federal Rule of Evidence 403 which pertains to the exclusion of *relevant* evidence; the court ruled that this evidence would "divert the jury from the issues raised in the indictment." These evidentiary rulings by the court not only prevented the defendants from presenting their defense, but, in so doing, the trial court also usurped the fact-finding functions of the jury.

In our system the jury, not the judge, is the trier of fact. It is not the function of the prosecutor or the judge to prescreen the defense case so that the jury only hears what the prosecution deems credible or appropriate. Here, the govern-

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[12] Order, Nov. 10, 1988, p. 1.

ment argued that the defendants' claims of government harassment were merely a "smokescreen" and just "the latest excuse" for not repaying loans. Couldn't the jury be trusted to see through the defendants' excuses if they were that flimsy? But the court, at the request of the prosecutors, in effect granted pretrial summary judgment to the government, preventing the jury from hearing the defense's explanation. As this Court held in *Washington v. Texas*, the right to present a defense is "the right to present the defendant's version of the facts as well as the prosecution's to the jury *so it may decide where the truth lies.*" *Supra* at 19 (emphasis added).

More recently, this Court has held that "criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and *the right to put before the jury evidence that might influence the determination of guilt.*" *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1967) (emphasis added).

The prosecutors in this case repeatedly presented the jury with evidence that lenders had not been repaid. For example:

1. *Lita Witt*

   Q. Okay. Did you ever get that principal?

   A. No, not a dime.

(Tr., Nov. 22, 1988, p. 12.)

2. *Goodwill Post*

   Q. Have you gotten any moneys from them other than the $250?

   A. Not a cent.

(Tr., Nov. 29, 1988, p. 8.)

In their closing arguments, the prosecutors argued to the jury that "a lot of people lost a lot of money." (Tr., Dec. 15, 1988, p. 26) It can be inferred that the jury was heavily influenced by these statements, given the jury foreman's statement after the trial that the reason for convictions was that "there was a lot of money lost." (*Washington Post*, Dec. 17, 1988.)

Yet the defendants could not present their defense: that it was the government itself which caused a lot of the money to be lost. The defense could not give the jury a fully-developed factual picture of harassment and interference with their political organizing and fundraising which impaired their ability to repay. They could allude to it, but they were barred by the motion *in limine* from "delving into details" which would flesh out the picture and show it to be more than just a convenient excuse for not paying debts. More importantly, the defense was barred from eliciting evidence to show—either through defense witnesses or cross-examination of government witnesses—that it was the government that caused the shutdown of the companies which held the loans, and that as a result the companies were prohibited *by court order* from repaying any loans.

Your *amicus* does not know if the jury would have found the defendants' explanation and their version of the facts credible. The jury might have concluded—as the Boston jury apparently did—that there was just too much evidence of government wrongdoing to find the defendants guilty. Or, they might have concluded—as the prosecutors urged—that the defendants were making up excuses and never intended to repay the loans. But the point is, we don't know—and no one knows—what the jury might have determined had it had all the facts before it. It is the jurors—not the judge—which are "the sole triers of fact and credibility." *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974).

The question of intent was a crucial one for the jury to decide. The government asserted that the defendants knew all along that they couldn't repay loans and that they solicited the loans with the conscious knowledge that they couldn't repay them. The prosecution structured its case so that the crucial evidence of intent was the ultimate nonpayment of the loans. Certainly the demonstrated loss of hundreds of thousands of dollars by the lender witnesses had a significant impact on the jury.

There was no disputing that many lenders had lost a lot of money. So the actual issue was, who was responsible, and did the defendants have reason to believe that they actually could

repay the loans? Thus, the burden of proof really shifted to the defense, to show that they had reason for their optimism, and that they had acted in good faith. Yet, the defendants were denied the right to "delve into details" on matters that objectively impaired their ability to repay loans, and on matters which subjectively influenced their state of mind about their anticipated ability to repay.

By ruling that the evidence of harassment was irrelevant, or that evidence concerning the bankruptcy was a diversion, the court in fact predetermined the issue of intent. But intent is an issue for the jury, not for the judge.

> "It is alike the general rule of law, and the dictate of natural justice, that to constitute guilt there must be not only a wrongful act, but a criminal intention. Under our system, (unless in exceptional cases), both must be found by the jury to justify a conviction for crime. However clear the proof may be, or however incontrovertible may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury." *People v. Flack*, 125 N.Y. 324, 334, cited in *Morisette v. U.S.*, 342 U.S. 246, 274 (1952).

In this case, by invading the function of the jury, the court destroyed the significance of the jury trial itself:

> Jurors may be perverse, the ends of justice may be defeated by unrighteous verdicts; but so long as the functions of the judge and jury are distinct, the one responding to law, the other to the facts, neither can invade the province of the other without destroying the significance of trial by court and jury." *Id.* at 274.

II. THIS CASE PRESENTS FUNDAMENTAL QUESTIONS ABOUT "THE INTEGRITY OF THE JUDICIAL SYSTEM"

Petitioners' case is one which has drawn widespread national and international attention, and which has raised those

very concerns about the integrity of the judicial system and public confidence in that system which were addressed by this Court in *United States v. Nixon:*

> "We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence." *U.S. v. Nixon*, 418 U.S. 683, 709, (1974).

The fact that a highly controversial, anti-establishment political figure and his associates were indicted, tried, and convicted under such rapid-fire procedures and restrictions on their ability to defend themselves, has created a widespread perception that an injustice was done. This is evidenced by the number of *amicus curiae* briefs submitted to the Court of Appeals by European notables as well as the fact that over 800 attorneys from the United States joined in submitting one *amicus* brief to the Appeals Court when petitioners' case was before it.

CONCLUSION

For all the reasons set forth above, this Court should grant the petition for a writ of *certiorari*.

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